151 U.S. 545

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 385.

J. S. LEWIS, PLAINTIFF IN ERROR,

vs.

A. C. MONSON, EXECUTOR OF DAVID D. WITHERS, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED FEBRUARY 14, 1891.

(14,483.)

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1 In the Circuit Court of the United States for the Southern District of Mississippi.

MONDAY, *November 3d*, 1890.

On this the 3d d-y of November, 1890, being the first Monday in said month and being the day fixed by law for the regular term of the U. S. circuit court for the southern district of Mississippi and the fifth circuit of the United States, there were present S. S. Matthews, U. S. marshal, & A. M. Lea, U. S. attorney for said district, and R. H. Winter, clerk of said court, none of the judges of said court being present. Thereupon, by virtue of a written order from Hon. R. A. Hill, one of the judges thereof, the marshal opened and adjourned said court until 9 o'clock to-morrow.

TUESDAY, *Nov'r 4th*, 1890.

Court met pursuant to adjournment.

Present: The Hon. R. A. Hill, judge of the U. S. district court for Mississippi; A. M. Lea, Esqr., U. S. att'y; M. A. Montgomery, ass't U. S. attorney; S. S. Matthews, U. S. marshal, & R. H. Winter, clerk.

JOHN S. LEWIS, Plaintiff,
vs.
D. D. WITHERS, Defendant. } #3505.

Be it remembered that heretofore, to wit, on the 24th day of June, 1889, there was filed in the office of the clerk of said circuit court of the United States a transcript of the record in the above cause
2 from the circuit court of Wilkinson county, Mississippi, hereinafter appearing, and that thereafter the pleadings & proceedings hereinafter shown were filed and had in said cause in said circuit court of the United States in manner and form & at the times herein appearing as follows, to wit:

3 *Transcript from Wilkinson County, Mississippi.*

JOHN S. LEWIS
vs.
W. H. SWAN *et als.* } No. 4.

Pleas before the Hon. Ralph Worth, judge of the circuit court of the 6th judicial district of the State of Mississippi, sitting in & for the county of Wilkinson, at the court-house, in the town of Woodville, on the first Monday, the 3rd day, of June, A. D. 1889.

Be it remembered that heretofore, to wit, on the 19th of April, 1889, came said plaintiff, by his attorney, and filed his declaration herein as follows, to wit:

STATE OF MISSISSIPPI, }
Wilkinson County. }

In the Circuit Court, to June Term, 1889.

John S. Lewis, the plaintiff in this action, by his attorney, demands of W. H. Swan, Wm. Curry, Ben. McQuarter, Willie Riley, Robert Baker, & Napoleon Bonepart, the defendants therein, the possession of a tract of land, with the appurtenances, situated in said county, containing eighty acres, more or less, and being lots (5) five and (6) six, sec. 22, T. 3, R. 5 west, & plaintiff says that his right to the possession of the same accrued on the 6th day of
4 March, 1889, & that the defendants wrongfully deprived him of the possession thereof, to his damages one hundred dollars. And the said plaintiff also demands of the defendants the sum of one hundred & fifty dollars for the use & occupation of said land by the defendants from the aforesaid day to the commencement of this suit, being at the rate of twelve hundred dollars a year.

D. C. BRAMLETT,
Att'y for Plaintiff.

On the same day of filing the foregoing declaration a writ was issued herein as follows, to wit:

THE STATE OF MISSISSIPPI, }
Wilkinson County. }

To the sheriff of Wilkinson county, Greeting:

We command you to summon W. H. Swan, Wm. Curry, Ben. McQuarter, Willie Riley, Rob't Baker, & Napoleon Bonapart to appear before the circuit court of Wilkinson county, to be held at the court-house, in the town of Woodville, on the 1st Monday of June, 1889, to answer the complaint of John S. Lewis, who demands
5 of them the possession of the following tract of land, with the appurtenances, situated in the county of Wilkinson, State of Mississippi, lots 5 & 6, sec. 22, T. 3, R. 5 west, containing 80 acres, more or less, & in default of them appearing & defending this action judgment will be entered against them & they will be turned out of possession of said land; and have you then there this writ, with your proceedings thereon.

Issued this 19th day of April, 1889.

[SEAL.] K. F. JOHNSON, *Clerk*,
By W. C. MILLER, *D. C.*

Return of sheriff, to wit:

Executed on all the within-named defendants by service of a true copy of the within summons, except on W. H. Swan, for whom I left a copy with W. B. Withers, who is over the age of 16 years, at the residence of said W. H. Swan the 20th day of April, 1889; said Swan not found.

F. D. LEWIS, *Sheriff*,
By R. C. SMITH, *D. S.*

Petition for servey, filed April 19th, 1889, to wit:

To K. F. Johnson, clerk of the circuit court of Wilkinson county:

The undersigned, J. S. Lewis, plaintiff in this action of
6 ejectment, *vs.* W. H. Swan *et als.*, in your hon. court, respectfully asks that a commission issue to W. H. Wheat, county surveyor of said county, or other surveyor, authorizing & directing him to make a survey of the land and premises sued for in this case according to notice to be served.

D. C. BRAMLETT,
Att'y for Pl'ff.

Filed April 19th, 1889.

K. F. JOHNSON, *Clerk*,
By W. C. MILLER, *D. C.*

In Circuit Court of Wilkinson County, Mississippi.

In ejectment.

June Term, 1889.

JOHN S. LEWIS
vs.
W. H. SWAN *et als.*

The defendants, W. H. Swan, Wm. Curry, Ben. McQuarter, Willie Riley, Rob't Baker, & Napoleon Bonapart, will take notice that the plaintiff in this cause will on Wednesday, the 1st day of May, 1889, apply to K. F. Johnson, clerk of said court, to issue a commission to the county surveyor of said county or other surveyor authorizing & directing him to make a survey of the land & premises sued for in this case.

J. S. LEWIS,
By D. C. BRAMLETT, *Att'y.*

7 To the sheriff of Wilkinson county to execute & return.

Sheriff's Return.

Executed personally on all the within defendants by service of a true copy of within notice, except on W. H. Swan, for whom I left a copy with W. B. Withers, who is over the age of 16 years, at the residence of said W. H. Swan this 20th day of April, 1889; said Swan not found.

F. D. LEWIS, *Sheriff*,
By R. C. SMITH, *D. S.*

Commission to Surveyor.

STATE OF MISSISSIPPI, }
Wilkinson County. }

The State of Mississippi to W. H. Wheat, surveyor of Wilkinson county, Greeting:

You are hereby commanded & authorized to make a survey of the land & premises sued for in an action of ejectment pending in our said court, wherein John S. Lewis is plaintiff & W. H. Swan *et als.* — defendants, described as follows: Lots (5) five & (6) six, sec. 22, T. 3, R. 5 west, containing 80 acres, more or less, and make report of such survey to our hon. court on or before the 1st Monday in June, 1889, & have then there this commission.

8 Witness my hand & official seal this 1st day of May, 1889.

[SEAL.] K. F. JOHNSON, *Clerk*,
By W. C. MILLER, *D. C.*

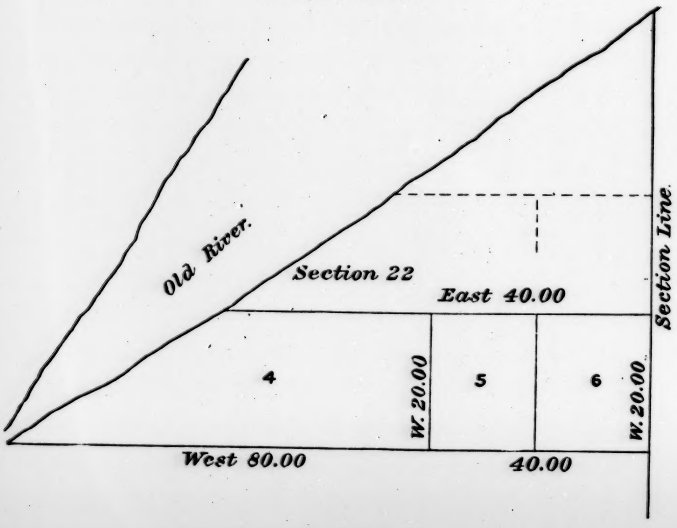
Sheriff's Return.

Executed this 2nd day of May, 1889, by handing W. H. Wheat a true copy of the within notice.

F. D. LEWIS, *Sheriff*,
By D. C. MILLER, *D. S.*

Report of surveyor, filed May 21st, 1889, to wit:

T. 3, R. 5. W.



To the hon. circuit court of Wilkinson county, Mississippi, to June term, 1889:

According to the command of a writ issued from the hon. circuit court of said county, I proceeded to survey lots 5 & 6 of sec. 22, T. 3, R. 5 W., by commencing at the ½-mile corner of secs. 6 & 7, T. 2, R. 5 W. (being the nearest established corner I could find),
9 and ran 199.52 chains to S. E. corner of sec. 22, T. 3, R. 5 W., on township line, where a cottonwood 48 inch. in di. — S. 27° 30′ W. 456 links; thence N. 20.00 ch's to stake, where a forked cottonwood 6 in. di. — N. 35.00 E. 70 l.; thence west 40.00 to stake, whence a cabin — N. 45° W. 161 l. to centre post of gallery; thence south 20.00 ch. to stake, whence a hackberry 20 in. di. — S. 46° E. 25 l., a hackberry 18 in. di. — N. 65° W. 11 l.; thence E. 40.00 ch's to place of beginning.

Respectfully submitted.

W. H. WHEAT,
Surveyor of Wilkinson County, Mississippi.

May 13, 1889.

Chain-carriers, A. E. Bennett, Tho. Garrison, W. Harrison.

Fees.

To 4 days @ 5.00 per day	$20 00
Platt	2 50
Chain-carriers	3 00
	$25 50

10 On the 3rd day of June, 1889, a petition of D. D. Withers was filed herein, to wit:

To the Hon. Ralph Worth, judge of the circuit court, Wilkinson county, Miss.:

Your petitioner, David D. Withers, respectfully shows to the court that suit in ejectment has been brought to this term of the court by John S. Lewis, plaintiff, against Wm. H. Swan, Wm. Curry, Ben. McQuarter, Willie Riley, Rob't Baker, & Napoleon Bonaparte for the recovery of a tract of land in said county described as containing eighty acres, more or less, & being lots (5) five & (6) six, sec. 22, T. 3, R. 5 west; that your petitioner claims that he is the owner in fee of said land; that the same forms & is a part of his plantation & lands in this county; that as owner he placed said defendants in possession of said lands, they being his tenants & employees, &, they having given him notice of said suit, he prays the court that he be admitted to appear & defend said suit as landlord, as provided by statute in this behalf—Rev. Code 1880, sec. 2482.

Respectfully submitted.

DAVID D. WITHERS.

THOS. J. CARSON,
H. S. VAN EATON, *Att'ys.*

11 At the June term, 1889, of said circuit court a motion was made herein as follows, to wit:

JOHN S. LEWIS
vs.
W. H. SWAN *et als.* } No. 4. Ejectment.

Motion by said David D. Withers to be admitted to defend as landlord as by suggestion & petition on file.

VAN EATON,
For Motion.
BRAMLETT, *Contra.*

Upon which motion the court made the following order, to wit:

JOHN S. LEWIS
vs.
W. H. SWAN *et als.* } No. 4, Appearance Docket.

Ordered by the court that David D. Withers be admitted to appear & defend this action as landlord.

On the 3rd day of June, 1889, a petition for the removal of this cause to the United States — court was filed herein as follows, to wit:

In the Circuit Court, Wilkinson County, State of Mississippi.

JOHN S. LEWIS, Plaintiff,
vs.
DAVID D. WITHERS, Def't.

The petition of David D. Withers, the above-named def't, shows to the court as follows:

12 That the above suit was begun in the circuit court for the county of Wilkinson, State of Mississippi, against Wm. H. Swan, Wm. Curry, Ben. McQuarter, Willie Riley, Rob't Baker, & Napoleon Bonaparte, tenants & occupiers of land of your petitioner, David D. Withers, who has by said court been admitted to appear & defend as landlord by the filing of a declaration or complaint on the 19th day of April, 1889, & the service of a summons, with the cause of action, on the 20th day of April, 1889.

That your petitioner has not yet filed his answer or plea, but that as to your petitioner said cause is now pending; that said cause has not been tried, & that this is the first term of said circuit court when your petitioner is or could be required by the laws of this State or the rule & practice of the court to answer or plead to the declaration or complaint of the plaintiff.

That at the time said suit was begun & at the present time the plaintiff, John S. Lewis, was & is a citizen & resident of the State of Mississippi, & the defendant, David D. Withers, was & is

13 a citizen & resident of the State of New York; that the matters in dispute in said suit & for which said suit is brought

exceeds the sum of two thousand dollars, exclusive of interest & costs.

And the defendant hereby offers Audley C. Britton & Geo. W. Koontz, of Adams county, State of Mississippi, as sureties for his entering in the circuit court of the United States for the district wherein said suit is pending, on the 1st day of the next session of said court or before, a copy of the record in said suit & for paying all costs that may be awarded by said circuit court if said court should hold that said suit was wrongfully or improperly removed thereto, and also for his appearing & entering special bail in such suit, if special bail was originally requested therein, and for his complying in all respects with the provisions in the premises of the act of Congress of the United States, approved March 5, 1887, entitled An act to amend an act of Congress, approved March 3rd, 1875, — An act to determine the jurisdiction of circuit courts of the United States & to regulate the removal of causes from State
14 courts & for other purposes, & to further regulate the jurisdiction of circuit courts of the United States & for other purposes.

Wherefore defendant prays this hon. court that said cause be removed into the circuit court of the United States, fifth circuit, district of Mississippi, & that this court proceed no further in the premises.

DAVID D. WITHERS.
THO. C. CARSON,
H. S. VAN EATON,
Att'y- for Def't.

D. D. WITHERS.

15 STATE OF NEW YORK,)
County of New York.)

David D. Withers, being duly sworn, says that he is the above-named petitioner in the above-entitled action; that he has read the foregoing petition & knows the contents thereof, & that the same is true of his own knowledge except as to matters therein stated on information & belief, and as to these matters he believes them to be true.

D. D. WITHERS.

Sworn to & subscribed before me this 23rd day of May, 1889.
EDWIN F. CAREY,
Commissioner for the State of Mississippi in New York.

16 Know all men by these presents that I, David D. Withers, a citizen & resident of the State of New York, as principal, & Audley C. Britton & George W. Koontz, of the county of Adams & State of Mississippi, as sureties, are jointly & severally held & firmly bound unto John S. Lewis, of the county of Wilkinson, State of Mississippi, in the sum of ($500) five hundred dollars; for which, will & truly — be paid unto the said John S. Lewis, his heirs, ex-

ecutors, administrator-, & assigns, we bind ourselves, our heirs, executors, administrators, & assigns, firmly by these presents.

Signed by us, sealed with our seals, & dated this 23rd day of May, 1889.

The condition of this obligation is such that if the said David D. Withers, defendant in a suit now pending in the circuit court for the county of Wilkinson, State of Mississippi, shall enter in the circuit court of the United States for the fifth circuit, district of Mississippi, on or before the first day of the next session thereof, a copy of the record in said suit, John S. Lewis, plaintiff, for the recovery of land, &c., and shall pay all costs that may be awarded by said circuit court if said court shall hold that said suit was wrong-
17 fully or improperly removed thereto, and shall also there appear & enter special bail, if special bail shall be requisite therein, and shall comply with existing law in reference to removal of causes from State courts, and shall enter appearance of said David D. Withers in said U. S. circuit court, then this obligation to be void and otherwise to remain in full force & effect.

In witness thereof the said obligors have hereunto set their hands & seals this 23rd day of May, 1889.

D. D. WITHERS. [SEAL.]
AUDLEY C. BRITTON. [SEAL.]
GEORGE W. KOONTZ. [SEAL.]

Witness:
E. F. CAREY.

STATE OF NEW YORK, }
County of New York. }

On the 23rd day of May, A. D. 1889, before me, Edwin F. Carey, a commissioner for Mississippi residing in the city of New York, personally appeared D. D. Withers, known to me to be the person described in, whose name is subscribed to, — who executed the within instrument, & he duly acknowledged to me that he executed the same.

Witness my hand & official seal this 23rd day of May, 1889.

[SEAL.] EDWIN F. CAREY,
Commissioner for the State of Mississippi in New York.

18 STATE OF MISSISSIPPI, }
Adams County, } *ss:*

We, Audley C. Britton & George W. Koontz, the sureties named in the foregoing bond, being duly sworn, do depose & say that we are residents of the State of Mississippi and property-holders therein; that we are worth the sum of five hundred dollars respectively over & above all our debts & liabilities and exclusive of property by law exempt from execution; that we have property in the State of Mississippi liable to execution of the value of more than five hundred dollars respectively.

AUDLEY C. BRITTON.
GEORGE W. KOONTZ.

Subscribed & sworn to before me, at Natchez, Miss., this 27th day of May, A. D. 1889.

[SEAL.] ALLISON H. FOSTER,
Clerk of the Chancery Court, Adams County, Mississippi.

Filed June 3rd, 1889.

K. L. JOHNSON, *Clerk.*
W. C. MILLER, *D. C.*

19 On the 3rd day of June, 1889, the circuit court of Wilkinson county, Mississippi, made an order herein as follows, to wit:

In the Circuit Court, Wilkinson County, Mississippi.

JOHN S. LEWIS, Plaintiff,
vs.
DAVID D. WITHERS, Def't, Admitted to Defend as Landlord. } No. 4.

On pleadings & proceedings herein & on the petition & bond filed herein by the defendant, David D. Withers, who has been admitted to defend as landlord under the provisions of the act of Congress of the United States, approved March 3rd, 1889, entitled An act to amend the acts of Congress, approved March 3rd, 1875, entitled An act to determine the jurisdiction of circuit courts of the United States & to regulate the removal of causes from State courts, and for other purposes, & to further regulate the jurisdiction of the circuit courts of the United States, and for other purposes, and on motion of H. S. Van Eaton, of counsel for defendant, it is ordered that the security offered by the said defendant, David D. Withers, be approved, & that the State court proceed no further in
19½ this cause, and that this cause be removed into the circuit court of the United States for the fifth circuit, district and State of Mississippi.

Dated this 3rd day of June, 1889.

STATE OF MISSISSIPPI, }
Wilkinson County. }

I, K. F. Johnson, clerk of the circuit court in & for said county, do hereby certify that the foregoing fourteen pages contain a true & correct transcript of the papers on file & orders of court therein in the cause therein mentioned as fully as the same appear in my office.

Witness my hand & official seal this 19th day of June, A. D. 1889.

K. F. JOHNSON, *Clerk,*
[SEAL.] By W. C. MILLER,
Deputy Clerk.

Filed June 24th, 1889.

R. H. WINTER,
Clerk U. S. Circuit Court, Southern District of Mississippi.

20 *Order for Substituted Declaration.*

JOHN S. LEWIS, Plaintiff,
vs. } 3505.
DAVID D. WITHERS, Def't.

By consent of parties it is considered and ordered that the plaintiff have leave to file a substituted declaration in lieu of that filed in the State court to cover the defects in the proceedings of removal, it being admitted that at and before the institution of this suit the plaintiff was and still is a citizen of the State of Mississippi and the defendant was and still is a citizen of the State of New York, and by like consent it is further considered and ordered that the plea of the defendant heretofore filed shall stand and be the plea to the substituted declaration.

Filed Nov'r 14th, 1890.

Entered M. B. 6, page 360.

R. H. WINTER, *Clerk.*

21 *Substituted Declaration.*

In the Circuit Court of the United States for the Southern District of Mississippi.

John S. Lewis, who is now and was at the commencement of this suit a citizen of the State of Mississippi, plaintiff in this action, demands of David D. Withers, who is now & was at the commencement of this suit a citizen of the State of New York, the defendant therein, the possession of a tract of land, with the appurtenances, situate in the county of Wilkinson, in the said southern district, containing eighty acres, more or less, and being lots five (5) and six (6) of section twenty-two, township three, range five west; and plaintiff says that his right to the possession of the same accrued on the seventh day of March, anno Domini eighteen hundred and eighty-eight, and that the defendant wrongfully deprives him of the possession thereof.

And the said plaintiff also demands of the defendant the sum of five hundred and fifty dollars for the use and occupation of said land by the defendant from the aforesaid day to the commencement of this suit, being at the rate of four hundred and fifty dollars per annum.

(Signed) D. C. BRAMLETT &
NUGENT & McWILLIS, *p. q.*

Endorsed: Filed Nov'r 14, 1890. R. H. Winter, clerk.

22 *Finding of Facts.*

J. S. LEWIS
vs. } 3505.
D. D. WITHERS.

This case having been submitted to the court as court & jury upon the written stipulation of the parties, the court finds the following as the facts upon which the rights of the parties are to be determined, to wit:

At the time the lands in controversy were entered and patented, in 1833 & 1835, to Cochrane they were included in lots three and four of section twenty-two, township three, range five west, as patented, and the whole section, as shown by the tract book of original entries, was subdivided into four lots, lot one containing 88 acres, lot two sixty-two acres, lot three eighty acres, and lot four one hundred and twenty acres, and are thus described in defendant's muniments of title. The old township map deposited in the office of the chancery clerk of Wilkinson county, the proper depository under the laws of Mississippi, does not show a division of the said section into lots. The new township map produced by the board of supervisors of said county under the special act of February 16, 1884, read in evidence, shows that the said section was subdivided into
23 six lots as follows: Lot 1, 88 acres; lot 2, 62 acres; lot 3, 40 acres; lot 4, 80 acres; lot 5, 40 acres; lot 6, 40 acres, making in the aggregate 320 acres. The new township maps procured by said board of supervisors are without certificate, but were accepted by the board in 1884, deposited in chancery clerk's office soon after the passage of said act, and from the day of their receipt have been recognized as the official township maps of the county, and the above division of said section into six lots and the acreage attached to each correspond with the plats and maps in the office of the register of the land office at Jackson, in this State, under the new subdivisional maps. The new maps procured under the said act of 1884 have been since their receipt used by the assessors and boards of supervisors in all matters relating to the assessment & equalization of land.

The minutes of the board do not show any order changing the assessment of D. D. Withers or that the acreage of lots 2, 3, & 4 was diminished, and shows no special order in regard to the said lands or lots 5 & 6 of said section, except that the assessment-roll of 1887, showing that lots 2, 3, & 4 contained 182 acres & lots 5 & 6 containing 80 acres, was received and approved at the time required by law.

In 1875, under a special act of the legislature ordering a new assessment of said lands in said county, said section twenty-two — as a whole to D. D. Withers, and as containing 350 acres; in
24 1879 it was assessed to him as lots 2, 3, 4, sec. 22, T. 3, R. 5 W., 262 acres; in 1883 it was assessed to him as lots 2, 3, 4, 260 acres, & in 1887, for the first time, said section was assessed

as follows: Lot 1, 88 acres, to S. A. Fetters, agent; lots 2, 3, 4, 182 acres, to D. D. Withers, & lots 5 &, 6, 80 acres, to "Unknown." There is no order of the board of supervisors adopting the new maps of 1884 nor the old maps, nor were they or the old maps ever marked "filed" by the clerk of said board. There was no order of said board ordering either of the maps to be recorded, but the new maps were received and paid for by the board in March or April, 1884, by an order on its minutes.

Section 22, T. 3, R. 5 W., was subdivided into 6 lots under the order of the department in or prior to 1848 and subsequent to their sale to Cochrane, and a map was made out by the surveyor general and a copy of that map, as to the lands in controversy, was deposited in the office of the chancery clerk of Wilkinson county. Of this new subdivision of his land into six lots the defendant had no notice, nor had he any notice of the procuring of the new maps of said county or of their having been received and paid for by the board of supervisors of said county. The assessor of the said county, in making up his assessment-roll of 1887, changed the description of the lands of defendant included in section 22 from
25 the return of assessment made by defendant's agent, without his knowledge or that of his agents, in accordance with the new maps procured under the act of 1884, and, thus assessed, the lands that *that* had in former assessments been put as lots 2, 3, & 4, sec. 22, were assessed as lots 2, 3, 4, 5, & 6, and in the manner above indicated. The defendant's agent and attorney went to the county site of Wilkinson county to pay defendant's taxes, because, upon a statement to defendant by the collector, the amount was much less than in former years and the acreage of his land largely reduced, and for the purpose of clearing up and adjusting the whole matter. He discovered lands of defendant not included in the list furnished to the assessor by Swan, the defendant's agent, and paid on them. He applied to the collector then engaged in attendance on the chancery court, who informed him that he did not think he had paid on all of defendant's lands, and introduced him to a Mr. Miller, his deputy, there in his office, as one more familiar with the lands in the county than any one else, and requested defendant's agent to make himself at home & use Miller until he got everything straight. In comparing the tax receipts of previous years with the tax receipt then in his possession said agent noticed the
26 discrepancy in the acreage of lots 2, 3, & 4, and called Miller's attention to it. Miller said he would see about it, stepped to the corner of the room & got the township maps, footed up the acreage of lots 2, 3, & 4, & found it 182 acres. Defendant's agent asked him how he accounted for the acreage, and he replied, Withers had been paying for years on land in the Mississippi river, but added, referring to the maps, These are the latest surveys and are, I suppose, correct.

Defendant's agent then looked at the map and saw lots 5 & 6 thereon and asked, Who do lots 5 & 6 belong to? Miller replied, I don't think they belong to Withers. Said agent replied, They are very close to Withers' land, and Miller answered he did not think

they were ever assessed to Withers and did not know whether they belonged to him or not. Said agent was doubtful about it; went back; made a thorough examination of Withers' muniments of title to see if lots 5 & 6 belonged to him. It was the first time he had ever heard of said lots 5 & 6, and he had no knowledge of the discrepancy nor of the map beyond the fact that said Miller told him it was the latest survey of the particular tract. When he saw a survey of lots 5 & 6 & could find no such lots in defendant's muniments of title he concluded the land did not belong to Withers,
27 but that they were water lots that belonged to no one, and that there was no land there. Said agent was then & there ready and willing to pay the taxes on lots 5 & 6, but he did not tender the money for the taxes and demand a tax receipt as prescribed by law because he did not think the lands belonged to Withers. He first ascertained his mistake when this suit was brought.

In the tax receipt given for the taxes of 1887 lots 2, 3, & 4, sec. 22, T. 3, R. 5, are stated to contain 182 acres, and in that for 1886 as containing 262 acres. The lands in controversy are worth six thousand dollars, and the annual rental value thereof four hundred and fifty dollars.

The pencil memorandum of defendant's lands, sent by Swan, his agent, to the assessor of said county as a return of assessment is not in the form required by the assessment laws of Mississippi, but it was accepted as sufficient by the assessor and was never changed or altered by Davis in any way after its delivery to C. W. Davis, county assessor, but on its face shows the following: Lot 4, sec. 22, T. 3, R. 5 W. (80 a.), 129, as part of Artorish plantation, and added in the total as 120 acres, and lot 3, sec. 22, T. 3, R. 5 W. (40 a.), 80, as part of Lochdale plantation, and added in the total as 80 acres. Op-osite the pencil memorandum of lot 3 there is a pencil memoran-
28 dum as follows, "See," which was made by the assessor. In the said pencil memorandum of lands, lot 2 of sec. 22 is placed above lot 3 of same section, and in lieu of the ditto marks there was afterwards written in ink the figures of the section numbered 22, and the figure 4 in the (40 a.) in brackets opposite lot 3 was traced in ink, but by whom & when these changes were made does not appear, nor is there any evidence on the point except that neither defendant nor his agent did it.

Lots 2, 3, & 4 were valued at nine dollars per acre, and lots 5 & 6 at one dollar per acre. The taxes only amounted to between two and three dollars on the land in controversy, and the amount paid by plaintiff to between four & five dollars.

(Signed) R. A. HILL, *Judge.*

Filed November 26, 1890.
Entered M. B. 6, page- 371, '72, '73.

R. H. WINTER, *Clerk.*

29 *Motion for Judgment.*

Circuit Court of the United States, Southern District of Mississippi, November Term, 1890.

J. S. LEWIS, Plaintiff,
vs.
D. D. WITHERS, Def't. } 3503.

And now comes the plaintiff in the above case and on the finding of facts stated by the court and placed on the minutes thereof moves the court for judgment in favor of the plaintiff and against the defendant therein for the land in controversy and the rents & profits thereof as admitted.

NUGENT & McWILLIS,
D. C. BRAMLETT, *For Motion.*

CALHOON & GREEN, *Contra.*

Filed Nov'r 26, 1890.
Ent. M. D., page 246.

R. H. WINTER, *Clerk.*

30 *Order Overruling Motion for Judgment for P'ff.*

J. S. LEWIS, Plaintiff,
vs.
D. D. WITHERS, Defendant. } 3505.

This day came on to be heard the motion of the plaintiff in the above-entitled cause for judgment on the finding of facts by the court as certified & signed, and the court, having carefully considered the said motion, denies and overrules the same; to which ruling of the court the plaintiff then & there instantly excepted, and his exception was allowed.

Filed Nov. 27, 1890.
Ent. M. B. 6, p. 374.

R. H. WINTER, *Clerk.*

31 *Judgment of the Court.*

J. S. LEWIS, Plaintiff,
vs.
D. D. WITHERS, Def't. } 3505.

This cause came on this day to be determined on the written stipulation of the parties and the finding of facts certified, filed, and entered of record therein, and the court, being thereof sufficiently advised, finds the issue joined for the defendant, and it is thereupon considered that defendant go hence without day and recover of the plaintiff and I. S. Joseph, the surety on his cost bond, the

costs herein expended, to be taxed, &c., for which let execution go, &c.

Entered M. B. 6, page 374.

R. H. WINTER, *Clerk.*

32 *Bill of Exceptions.*

In the Circuit Court of the United States for the Southern District of Mississippi, November Term, A. D. 1890.

J. S. LEWIS, Plaintiff, *vs.* D. D. WITHERS, Defendant. } 3505.

Be it remembered that this case was called for trial by and before the court as court & jury under the written stipulations filed therein on this day of November, A. D. 1890, at the term aforesaid of the court aforesaid, and, the pleadings having been read, it was agreed that all evidence should be offered subject to objections, the court to consider only that which was competent, & thereupon the plaintiff introduced & read in evidence a tax deed from the tax-collector of Wilkinson county, which, with the certificate and endorsements thereon, is in the words & figures following, to wit:

Tax-collector's Deed.

THE STATE OF MISSISSIPPI, *Wilkinson County,*

I, F. D. Lewis, tax-collector of Wilkinson county, have this day, according to law, sold the following land, situated in said county, to wit:

33 Division of section.	Section.	Township.	Range.	Acres.
Lots 5 & 6	22	3	5 W.	80

for the taxes assessed thereon for the year 1887, when J. S. Lewis became the best bidder at the sum of $4.84. I therefore convey said land to the said J. S. Lewis, his heirs & assigns forever.

Given under my hand the 6th day of March, A. D. 1888.

F. D. LEWIS,
Tax-collector.

STATE OF MISSISSIPPI, *Wilkinson County.*

Personally appeared before me, R. W. P. Huff, clerk of the chancery court, the within-named F. D. Lewis, T. C., who acknowledged that he signed & delivered the foregoing instrument on the day & year therein mentioned.

Given under my hand & seal of the court hereunto affixed this 6th day of M'ch, A. D. 1888.

[SEAL.] R. W. P. HUFF, *Clerk.*

Endorsed.

Tax-collector to J. S. Lewis. } Deed.

Sheriff's fees		$2 00
Clerk's fees		45
34 Printer's fees		40
State tax		28
County tax		1 08
Damages		13
Excess		50
Total		4 84

Filed in the chancery clerk's office of Wilkinson county, Mississippi, on the 6th day of M'ch, A. D. 1888.

R. W. P. HUFF, *Clerk.*

Filed for record March 19, 1889, at 9 o'clock a. m.

R. W. P. HUFF, *Clerk.*

STATE OF MISSISSIPPI, }
Wilkinson County. }

I, R. W. P. Huff, clerk of the chancery court in & for said county & State, do hereby certify that this deed of conveyance hereunto attached from F. D. Lewis, tax-collector, to J. S. Lewis has this day been recorded in Record Book No. GG, page 159, among the records of deeds of said county.

Witness my hand and official seal this 19th day of M'ch, A. D. 1889.

[SEAL.] R. W. HUFF, *Clerk.*

——— ———,

Deputy Clerk.

35 It was thereupon admitted that the property in controversy was worth six thousand dollars and the annual rental thereof $450.00.

The plaintiff then rested his case.

Defendant then introduced & read to the court an agreed statement of C. W. Davis, who was the assessor of Wilkinson county at the time of the assessment under which the tax title in this case accrued was made, & the Exhibit "A" thereto, being a pencil memorandum of defendant's land, in the words & figures following, to wit:

C. W. Davis' Statement, Ex. "A."

C. W. Davis, assessor of lands in Wilkinson county, Mississippi, for the year 1887, states that the assessment of lands of D. D. Withers

for that year was given in to him by R. P. Swan, agent for D. D. Withers, & that Ex. A to this statement is exactly as given him by said Swan except the check-marks & the words "sec." written on the right-hand margin, & he does not now remember why he wrote said word.

This Nov. 11th, 1889.

C. W. DAVIS.

36 It is agreed that the above statement may be admitted in evidence on the trial of the ejectment suit, Jno. S. Lewis *vs.* D. D. Withers, as the sworn testimony of C. W. Davis so far as competent & relevant.

Nov. 11, 1889.

D. C. BRAMLETT,
Att'y for Plaintiff.
H. S. VAN EATON,
Of Counsel for Defendant.

Endorsed: C. W. Davis' statement, Ex. "A."

37 EXHIBIT "A" TO STATEMENT OF C. W. DAVIS, IN PENCIL.

S. ½	Sec. 2 x.	T. 2 ..	R. 5 W...	320
Lot 2	" 3 x.	" " ..	" " " ...	115
	(Not laid	off in lots.)		
Lots 1, 2, 3, 4, & 5	Sec. 4 x.	T. 2 ..	R. 5 W...	541
All of	" 5 x.	" " ..	" " " ...	633
All of	" 8 x.	" " ..	" " " ...	460
All except E. ½ of S. W. ¼	" 7 x.	" " ..	" " " ...	529
Lots 5, 9, 10, 13, & 14	" 9 ...	" 4 ..	" " " ...	316
That portion south of narrows of lot 1 & of lot 5.	" 3 x. " 20 x.	" 5 " 5	.....	See. About 90. See.
W. ½ of N. W. ¼	" 6 x.	" 5 ..	.....	79.62
S. E. ¼ & E. ½ of S.W. ¼	" 6 x.	" 5 ..	R. 5 W...	238.87
Lot 4	" 22 x.	" 3 ..	" 5 ...	(80 a.) 120
S. W. ¼	" 1 x.	" 2 ..	5 ...	159.25
N. ½	" 2 x.	" 2 ..	5 ...	320
		(39, 57,	24.)	
Lot 2	Sec. 22 x.	T. 3 ..	R. 5 W...	62
Lot 3	" 22 x.	" " ..	" " ...	(40 a.) 80
E. ½	" 1 x.	2 ..	" " ...	318.91
N. ½	" 9 x.	2 ..	" 4 ...	333
All of	" 8 x.	2 ..	" 4 ...	647
N. W. ¼	" 1 x.	2 ..	" 5 ...	159.25
N. W. ¼ & W. ½ of S. W. ¼	" 23 x.	3 ..	5 ...	241.12
E. ½ of S. W. ¼ & W. ½ S. E. ¼	" 23 x.	3 ..	5 ...	160.75
	(Lochdale, 2,00	2.60.)		

38 & 39	All of.....	Sec. 15 x.	T. 3..	R. 5 west.	315
	Lots 2, 3, 4, & 5	" 16 x.	3..	5 " ..	356
	W. ½ of N. W. ¼, N. ½ of S. E. ¼, & S. W. ¼.	" 21 x.	3..	4 " ..	348
	W. ½ of S. W. ¼ (lot 4).	" 22 x.	3..	4 " ..	83
	N. W. ¼.....	x 32...	3..	4 " ..	161.69
	Lot 1.....	x 16...	3..	5 " ..	80
	S. ½ of lots 2 & 3	22 x.	3..	4 " ..	83
	S. W. ¼ of N. E. ¼ & x S. E. ¼ of N. W. ¼...	21 x.	3..	4 " ..	87
	S. E. ¼ of N. E. ¼.....	21 x.	3..	4 ..	43.01
		Lachlecom, 1,557.70.			

Sec. 21, 3, 4 W., different from old roll.

The following are the endorsements on the back of this paper, viz: D. D. Withers' real assessment. Ex. A to Statement of C. W. Davis. I want to buy a tax title to E. ½ of S. W. ¼ sec. 7, T. 2, R. 5 west. Certified copy of deed from Felter to Lovel of Good Hope plantation (all in pencil).

40 Defendant then introduced & read to the court two other statements of facts, dated Nov. 12th, 1889, and October 30th, 1890, in the words & figures following, to wit:

In U. S. Court, Jackson, Miss.

JNO. S. LEWIS
v.
D. D. WITHERS. } Ejectment.

On trial of above cause the following statements will be admitted & may be used as evidence, namely (if competent & relevant):

1. That with regard to sec. 22, T. 3, range 5 west, the tract book of original entries shows the following as entries of said section:

Lot 1.....	88 acres.
" 2.....	62 "
" 3 & 4.....	200 "
In all.....	350 acres.

2. The old township map on file in ch'y clerk's office, Wilkinson county, Miss., does not show a division of said section into lots.

41 3. The new township maps procured by board of supervisors under act of legislature approved Feb'y 14, '84 (Sheet Acts of 1884, page 388), shows the following division of lots & acreage in said sec. 22, namely:

Lot	1	88 acres.
"	2	62 "
"	3	40 "
"	4	80 "
"	5	40 "
"	6	40 "
In all		350 acres.

These new maps were procured by the board of supervisors under said act of 1884; are without any certificate, but were accepted by the board of supervisors, filed in the chancery clerk's office soon after the passage of the act, and from that day have been recognized as the official township maps of the county, & the above division into lots & acreage corresponds with plat in the office of the register, Jackson, Miss.

4. In 1875 & under special act in 1876 sec. 22 was assessed to D. D. Withers as a whole—350 acres.

In 1879 lots 2, 3, 4, sec. 22, T. 3, R. 5 W., 262 acres, assessed
42 to D. D. Withers.

In 1883 lots 2, 3, & 4, 260 acres, assessed to D. D. Withers.

In 1887, the assessment of said sec. 22 was as follows:

Lot 1, 88 acres, to S. A. V. Felters, ag't.

Lots 2, 3, & 4, 182 acres, to D. D. Withers.

Lots 5 & 6, 80 acres, to unknown.

Signed this Nov. 12th, 1889.

D. C. BRAMLETT,
Att'y for Pl'ff.
H. S. VAN EATON,
Of Counsel for Defendants.

43 U. S. Court, Jackson, Miss.

J. S. LEWIS
vs.
D. D. WITHERS.

Agreed Statement of Facts.

See page — of this transcript.

Sec. 22, T. 3, R. 5 W., Wilkinson Co., Miss.

Tract book, original entries, shows: Entered in 4 lots—lot 1, 88 acres; lot 2, 62 acres; lots 3 & 4, 200 acres. Total, 350 acres.

Old township maps did not show a division of section into lots.

New township maps of 1884 shows division as follows: Lot 1, 88 acres; lot 2, 62 acres; lot 3, 40 acres; lot 4, 80 acres; lot 5, 40 acres; lot 6, 40 acres=350 acres.

In 1879, lots	2 & 3 & 4,	assessed to	Withers	262	acres.
" 1883, "	2 & 3 & 4,	"	"	260	acres.
" 1887, "	2 & 3 & 4,	"	"	182	"
" " "	1,	"	Felters	88	"
" " "	5 & 6,	"	unknown	80	"

& this was the first time lots 5 & 6 appeared on the assessment as such lots.

In 1875, sec. 22 assessed as a whole to Withers, 350 acres.

Neither new nor old township maps marked filed. Old township maps labelled or marked, "Township maps of Wilkinson county, Miss., 1874." New township maps labelled or marked,
44 "Township maps of Wilkinson county."

New township map was ordered, received, & paid for by board of supervisors in 1884 under special act of legislature of that year.

R. W. P. Huff, clerk of ch'y court in 1884, since then, & now, states that since receipt of new maps in 1884 they have been among the records of his office & used & recognized as the official maps of the county, & since their rec'pt the old maps have been cast aside. This map of 1884 has been used by assessor & board of supervisors in all matters relating to the assessment & equalization of land.

The minutes of the board of sup'r- do not show any order changing the assessment of D. D. Withers or that the acreage of lots 2, 3, & 4 was diminished; in fact it shows no special order of the board in regard to these lands or lots 5 & 6, except that the assessment-roll of 1887, showing lots 2, 3, & 4, containing 182 acres, & lots 5 & 6, containing 80 acres, was received & approved at the time required by law.

There is no order on the minutes of the board of sup'r-
45 adopting new maps of 1884 nor the old map, nor was it or the old map ever marked "filed" by the clerk of the B. of S., and none ordering it or the old map to be recorded, but said new map was received & paid for by the board of sup'rs in March or April, 1884, by order on the minutes of said board.

That the rental value of said land is $450 per annum.

It is agreed that the above agreed statement of facts may be read in evidence subject to legal objections on exceptions for irrelevancy.

Woodville, Miss., Oct. 30, 1890.

D. C. BRAMLETT,
Att'y for Plaintiff.
H. S. VAN EATON,
Att'y for Def't.

46 Defendant then introduced WILLIAM SWAN as a witness, who, being sworn, testified as follows:

WILLIAM SWANN, witness for defendant, sworn, testified:

Q. Where are you living, Mr. Swann, now?

Ans. Bessemer, Alabama.

Q. Were you ever in the employ of D. D. Withers, the defendant in this case?

Ans. Yes, sir.

Q. In what capacity?

Ans. As book-keeper; manager of plantations first & latterly as general agent of the property—whole property.

Q. What relation are you to B. P. Swan?

Ans. Son.
Q. What position did B. P. Swan occupy to D. D. Withers?
Ans. Mr. Withers' agent.
Q. General agent?
Ans. Yes, sir.
Q. Is Mr. Swan now living—B. P. Swan?
Ans. No, sir.
Q. What year did he die in?
A. In 1887.
Q. Do you remember about what month?
A. October.
Q. Are you familiar with the handwriting of D. D. Withers?
Ans. Yes, sir.
Q. Also the handwriting of B. P. Swan?
Ans. Yes, sir.
47 Q. Just examine this slip & state whose handwriting it is.
(Exhibit "A" to C. W. Davis' deposition here handed witness.)
Ans. From the description here I would say this hand was of D. D. Withers.
Q. Did you ever see this slip before?
Ans. Well, not to my recollection; I may have, but I don't know that; my father may have made that out; I have seen it before.
Q. When did you see it before?
Ans. To my certain knowledge, since this suit was instituted; not before, to my recollection.
Q. Examine the interlineations there, opposite lots 2, 3, 4, sec. 22, township 3, the words 40 a. & the 80 a. in the intervening space between the figures as run out & the lots 3——
Ans. It is 22 in ink, & the rest of it is in lead pencil.
Q. Whose handwriting is it in?
Ans. Lot 3, I should say, is in Mr. Withers' handwriting. I see a note on the margin here, "see."
Q. Whose handwriting is that?
Ans. I don't know, sir.
Q. Is it Mr. Withers'?
48 Ans. Neither Mr. Withers' nor my father's. I see "see" above here.
Q. Look in the middle there just opposite that & you will see 40 a. or 80 a. Whose handwriting is that?
Ans. I am not familiar with it.
Q. Is it either Mr. Withers or B. P. Swan?
Ans. Neither Mr. Withers or Mr. Swan.
Q. Is it in the handwriting of any person in the employ of Mr. Withers?
Ans. No, sir; unless I did it there would be no one else to do it except my father.
Q. There is one below 80 a., opposite the other "see"?
Ans. Above.
Q. Is that in the handwriting of either Mr. Withers or Mr. B. P. Swan or yourself?

Ans. No, sir.
Q. Whose handwriting is it?
Ans. I don't know, sir; it does not look like either Mr. Withers' or my father's.
Q. Are you in Mr. Withers' employment now?
Ans. No, sir.
Q. How long since you left his employ?
Ans. Since the 1st of last February.

Defendant then introduced John SMYLIE as witness, who,
49 being sworn, testified as follows:

Q. Mr. Smylie, are you in the United States land office here?
Ans. Yes, sir.
Q. Have you present in court the original township map of Wilkinson county, section 22, 3 & 5 west?
Ans. Yes, sir; the original & duplicate.
Q. Will you please produce it?
Ans. Yes, sir.

The defendant here offered in evidence the original map of land in controversy herein inserted at the close of the testimony of this witness and showing that section 22 was divided into lots 1, 2, 3, & 4 only, & that Moses Sidell entered lot 1 on the 17th of October, 1833, & Alfred Cochrane entered lots 3 & 4 on the seventh of August, 1835, & that Wright & Giles entered lot 2, & that by the original map lot 1 contained 88 acres, lot 2, 62 acres, & lot 3, 80 acres, & lot 4, 120 acres.

In order to show the invalidity of the assessment as against the defendant, the defendant offered in evidence the second subdi-
50 vision of survey of the land in controversy herein inserted at the close of the deposition of this witness & showing that the section was divided into 6 lots instead of 4 lots.

Q. Under what act of Congress was this subdivisional map made?
Ans. The latter one was an amendment, I think, to the act of 1836. I do not remember just what day, but that subdivisional map was made under instructions from the department. You see the act provides that the department shall instruct the surveyor general to make a subdivisional map.
Q. Under the act of what year was this subdivisional map made?
Ans. Under the act amendatory to that of 1836, but I do not remember what time. It was issued by the surveyor general's office in 1838.
Q. An act amendatory of the act of 1836?
Ans. Yes, sir.
Q. Mr. Smylie, have you the patent to the lands?
Ans. I have.

(Witness here produced the original patent to the lands.)
51 The original to Alfred Cochrane, through whom defendants claim, was here offered in evidence, showing that the lands were conveyed as lots 2, 3, 4, sec. 22, T. 3, R. 5 W.

Q. Mr. Smylie, what parts of lots 1, 2, 3, & 4 on the original map is made up of lots 5 & 6 on the subdivisional map?

Ans. It is the east half of lot 4 & the south half of lot 3.

Q. Do you know the handwriting of E. G. Forshey, U.S. deputy surveyor in 1846?

A. No, sir; only from comparing it with the record.

Q. Have you a large number of records in your possession showing his handwriting?

Ans. We have had; yes, sir.

Q. Would you say that you knew his handwriting if you were to see it?

Ans. No, sir; except by comparing it. I would not like to say that was his handwriting unless it was the original notes; they are on file with the records.

Q. Look at this. Here is one of the original maps.

52 Ans. I do not think the two maps are written by one man. The signature to the one & the signature to the other are not the same. The map offered as an original looks more like a field-note to those that were presented to surveyor general's office by Forshey than the map shown witness for the purpose of——

Q. You would not undertake to say this was Mr. Forshey's handwriting?

Ans. No, sir; not unless I had the original field-notes here.

Q. Will you take it out & compare it & come back some time hereafter & let us know, pleas-?

Cross-examination:

Mr. Smylie, tell the court, if you please, how this new survey came to be made, when it was filed in the office, whether it has been ever since regarded as the official survey of the lands in controversy?

Objected to as being incompetent, the defendant having introduced it for the purpose of showing the invalidity of assess-

53 ment.

The subdivisions were made in this plat to approximate as close as they could to 80 acres; that was the first instruction to the surveyor general. Subsequently the department instructed them to make the subdivisions approximate as close as could be to $\frac{1}{16}$ of a section. After the surveys were made & filed by the surveyor general they received instructions from the department to go on & resubdivide the tract, and that was the cause of this subdivision, & during the time that Lake, the surveyor general of the district of southern Tennessee, got the original of those plats, filed them with the surveyor general. I do not pretend to say just what date they became the official records of the surveyor general's office, but it was some time during the year 1849, to the best of my recollection.

Q. Have these latter plats been regarded ever since as official?

Ans. Yes, sir; they are the official plats of the United
54 States now. These (referring to the old ones) are only held by the office to show the disposition of the lands prior to the filing of those.

Q. Under the original?

Ans. Yes, sir.

Redirect ex.:

Q. Has there ever been any entry on lots 5 & 6 on this subdivisional plat?

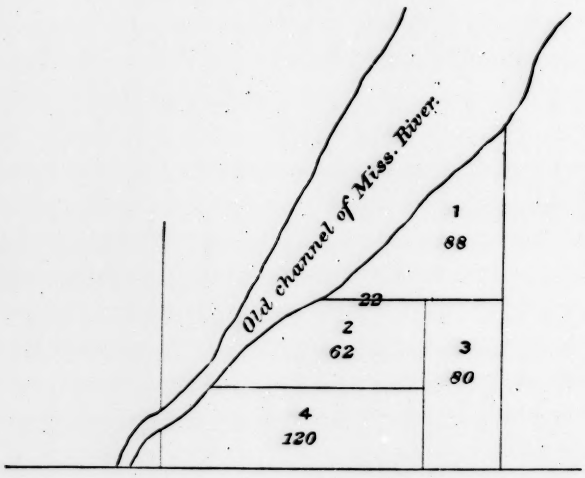
Ans. The lands had been disposed of by the Federal Government is as far as that goes.

Q. That could have no reference to lands before sold by the Government?

Ans. No, sir; it subdivided a section without reference to sale or disposition.

The maps above referred to & showing subdivision of sec. 22 in lots are as follows:

55 No. 1. T. 3 N., R. 5 W.

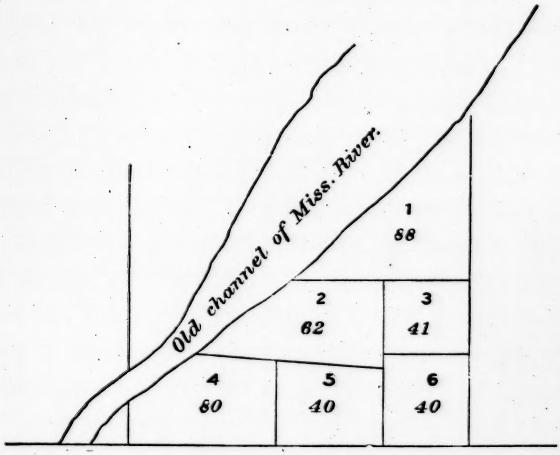


I, Edgar S. Wilson, commissioner of swamp lands & having in my official keeping as such the records of the surveyor general's office, do hereby certify that the above drawing is a copy of the original plat of township 3 N., range 5 west, Washington meridian, in so far as the same relates to the four subdivisions (or lots) in section 22, in said township & range.

Given under my hand & official seal, at Jackson, Miss., this the 18th day of November, A. D. 1890.

[SEAL.] EDGAR S. WILSON,
Commissioner.

56 No. 2. T. 3 N., R. 5 W.



NOTE.—Subdivision plat under act of Congress approved May 5th, 1832. Filed ——.

I, Edgar S. Wilson, commissioner of swamp lands & having in my official keeping as such the records of the surveyor general's office, do hereby certify that the above drawing is a copy of the original subdivisional plat of section 22, township 3 N., range 5 W., Washington meridian, & that the same shows six subdivisions or lots in said section, township, & range.

Given under my hand & official seal, at Jackson, Miss., this 18th day of November, 1890.

EDGAR S. WILSON, [SEAL.]
Commissioner.

57 It was then admitted that the land in controversy is claimed by the defendant, D. D. Withers, through mesne conveyances from Alfred Cochrane, & that his title is good unless the claim of tax title of plaintiff is valid, in which case the tax title will be paramount & entitle plaintiff to a recovery, & that the land in controversy is part of Artoresh and Lockdale plantations & that the lands in controversy were first assessed as lots 5 & 6, sec. 22, T. 3, R. 5, in 1887, the first assessment after 1884.

The defendant then introduced as a witness D. D. WITHERS, who, being sworn, testified as follows:

Q. State your name, age, residence, & occupation & whether you are the defendant in the above-styled suit.

Ans. My name is David Dunham Withers; my age is sixty-five; I reside in the city of New York, & have no occupation. I am the defendant in the above-styled suit.

Q. State what, if anything, you have had to do with the assessment of the lands in controversy since the year 1880; state what knowledge you have had of the assessment of your property in Wilkinson county, including the property in controversy, since 1880.

58

A. I have had nothing to do with the assessment of the lands in controversy since the year 1880. I have had no knowledge of the assessment of my property in Wilkinson county, including the property in controversy, since 1880, beyond the general item of money paid for taxes appearing in my account with Mr. George W. Koontz, of Natchez.

Q. State what knowledge or information, if any, you had of the adoption of a new township map by the board of supervisors of Wilkinson county in 1884.

A. I have no knowledge or information of the adoption of a new township map by the board of supervisors of Wilkinson county in 1884.

Q. Who made the returns for assessment to the assessor of Wilkinson county of your lands in said county? Who paid the taxes? What personal knowledge did you have of such assessment or payment?

A. I do not know who made the returns to the assessor of Wilkinson county of my lands in said county. The taxes were paid by Mr. George W. Koontz, of Natchez. I had no personal knowledge of such assessment or payment.

59

Q. When did you first learn of a new subdivision of your property in Wilkinson county by assessment?

A. I first learned of a new subdivision of my property in Wilkinson county by assessment in May, 1890, through a letter from my counsel, Thos. J. Carson, of Natchez, informing me that J. S. Lewis had brought an action of ejectment for the possession of a part of section 22, township 3, range 5 west, basing his claim on a tax title.

Q. State when you first heard that lots 3 & 4, section 22, township 3, range 5 west, had been reduced from one hundred & twenty acres & eighty acres respectively to eighty acres & forty acres respectively; also when you first heard of lots five & six being carved out of lots three & four of said section, township, & range by the assessment or the adoption of a new township map for Wilkinson county.

A. I first learned in May, 1890, through the letter from my counsel, Mr. Thos. J. Carson, referred to in my answer to the previous interrogatory, that lots 3 & 4, section 22, township 3, range 5 west, had been reduced from 120 acres & 80 acres respectively to 80 acres & 40 acres respectively; and at the same time & by the same means I first heard of lots 5 & 6 being carved out of lots 3 & 4 of said section, township, & range by the assessment or the adoption of a new township map for Wilkinson county.

60

Q. State whether or not after the returns for the assessment of your lands, lots three & four, section 22, township 3, range 5 west, had been made to C. W. Davis, assessor of said county, you had any notice or information of any change of such returns and

when you first learned of any change being made either by the assessor or by the board of supervisors of Wilkinson county.

A. I had no notice or information of any change of the returns for the assessment of my lands, lots 3 & 4, section 22, township 3, range 5 west, after they had been made to C. W. Davis, as-
61 sessor of said county, & I first learned of any change being made, either by the assessor or by the board of supervisors of Wilkinson county, in May, 1890, through the letter of my counsel, Mr. Thos. J. Carson, before referred to.

Q. State whether or not you knew, prior to the sale for taxes of lots 5 & 6, section 22, township 3, range 5 west, and the time for redemption of the same had expired, that said lots had been carved out of lots 3 & 4, section 22, township 3, range 5 west, after your return of assessment had been made.

A. I had not known prior to the sale for taxes of lots 5 & 6, section 22, township 3, range 5 west, & the time for redemption had expired, that said lots had been carved out of lots 3 & 4, section 22, township 3, range 5 west, after my return of assessment had been made.

Q. State anything else you may know of interest to either party to this suit.

A. I can think of nothing else of interest to either party to this suit, except, perhaps, that I first acquired the land in controversy about 1855, under the description given in the return of my
62 lands for assessment, and that the taxes have been paid ever since on that description as embracing that number of acres now claimed by J. S. Lewis in the above-entitled suit.

Cross-examination:

Q. Who was your agent for the return of assessment & payment of taxes on the lands in controversy during the years 1886, 1887, & 1888?

Ans. Mr. Geo. W. Koontz, of Natchez, was general agent for my property in Wilkinson county during the years 1886, 1887, & 1888. Whether he confided the return of assessment & payment of taxes on the lands in controversy during the years 1886, 1887, & 1888 to *to* any special agent or performed the duties in person I do not know.

The defendant then introduced as a witness GEORGE W. KOONTZ, who, being sworn, testified as follows:

Q. State your name, age, occupation, & place of residence.

A. My name is Geo. W. Koontz; I am 38 years old, & reside in Natchez, Miss.; I am employed in the banking-house of
63 Britton & Koontz.

Q. State whether or not you are the general agent in this State for the defendant, D. D. Withers, &, if you say yes, how long have you been his agent.

Ans. I have represented D. D. Withers, the defendant in this case, since my father's death, in 1875, in his financial business in

this State, & my acts have been recognized by him, although I do not & have never held his power of attorney.

Q. Is the defendant, D. D. Withers, a non-resident of this State, & by whom has his taxes on his lands in Wilkinson & Adams counties been paid for a number of years past?

Ans. The def't is a non-resident & lives in the city of New York. I have paid his taxes in Wilkinson & Adams county since 1875, generally through Hart & Joseph, in Wilkinson county.

Q. Did you, as agent of Mr. Withers, or any other person within your knowledge authorized by him, hand to the assessor of Wilkinson county in 1887 a slip containing the assessment of lands
64 in that county belonging to said defendant?

A. I did not render to the assessor of Wilkinson county, 1887, a list of Mr. Withers' land for assessment, & none was rendered, unless by B. P. Swan, Mr. Withers' manager, who resided on the plantation & who was in the habit of rendering the lands to the assessor. Mr. Swan died in Oct., 1887, & was sick some months prior to his death.

Q. Were you, as the defendant's agent, notified by the said assessor in 1887 or by any other person that the description by which the land in controversy had been known & assessed & taxes paid for years past had been changed that year by said assessor & two lots never before on the assessment-roll, to wit, lots 5 & 6, section 22, township 3, range 5 west, carved out of defendant's land, formerly described as lots 2, 3, & 4 of said section & assessed as "unknown"?

A. No; I never heard of lots 5 & 6, in fractional section 22, township 3, R. 5 west, until this suit was commenced.

Q. Did or not the defendant, being a non-resident, leave
65 the assessment of his lands in this State & the payment of his taxes thereon to his agents here?

A. Yes; he did. Mr. Swan handed the list of lands to the assessor, & was in the habit of keeping the lands straight, & I paid the taxes.

Q. Why was not the said assessor of Wilkinson county in 1887 furnished by you with a slip containing a description & valuation of the defendant's lands in that county?

A. I knew that all the lands owned by Withers in Wilkinson county were on the rolls prior to 1887, & Mr. Swan was in the habit of seeing to the assessment, & besides I was satisfied with former descriptions and valuations.

Q. Did the said assessor in 1887 fail to assess to the defendant any other lands than the eighty acres in controversy that belonged to him, & that you had paid the taxes on for the defendant for a number of years prior thereto, which had been assessed to the defendant up to 1887? If you say yes, state how much land was omitted by him & whether or not you had it as assessed to him afterwards & paid the taxes thereon for the year 1887.

66 A. Yes; some twelve to fifteen hundred acres. When I received the tax receipt for 1887 I saw that Mr. Withers' land assessment had been changed, & I then employed an attorney

to go to Woodville & see that all Mr. Withers' land was on the roll, as Mr. Swan was dead. He did so, & found a large quantity omitted by the assessor, which he had replaced on the roll, & I paid the taxes on it for Withers.

Q. By what description had the eighty acres in controversy been assessed prior to 1887 & the taxes paid on it as so described?

A. First under description, all of fractional section 22, township 3, R. 5 west, & afterwards by lots 2, 3, & 4, said section 22, for a number of years.

Q. When did you first ascertain that the description of the land in controversy had been changed by the assessor on the roll to lots 5 & 6, & assessed as unknown?

A. When W. H. Swan, who succeeded his father in the management of the plantation, brought me a summons served on him to defend the present suit. I think it was in April, 1889.

67 Q. State anything else within your knowledge that may be of advantage to the said defendant.

A. I know nothing else.

Cross-examination:

—. Who, if any one, was agent or in possession and control or manager & residing on def't's Withers plantation & lands in Wilkinson county in 1887? If you answer no one, state what employment, if any, B. P. Swan had in connection with said land or as manager residing thereon or otherwise.

A. B. P. Swan lived on & managed the plantation of D. D. Withers in Wilkinson county, 1887, up to the time of his death, 1887.

Q. Did you, as agent of def't, directly, at any time & place & for any year, give to assessor of Wilkinson county the assessment of def't's lands in Wilkinson county? If so, to which assessor, & where was it done? Answer fully.

Ans. No, I did not; Mr. Swan attended to that branch of Mr. Withers' business.

68 R. R. Ford was then introduced as a witness for the defendant, being sworn, & testified as follows:

Q. Where do you reside?

Ans. In Adams county.

Q. What is your occupation?

Ans. Mostly surveying; farm some.

Q. Did you ever make a survey of section 22, township 3, range 5 west, Wilkinson county, the land in controversy?

Ans. Yes, sir.

Q. Please examine this map & state by whom it was made and when.

Ans. I made that survey of that section.

Q. Just state, if you recognize that map, by whom it was made & when.

Ans. I made this; made the survey & then made the plat also.

Q. When?

Ans. The 24th & 25th of June, 1889.

Q. What was the result of your survey of lots 2 & 3 & 4, & how much acreage was contained in the original lots 2, 3, & 4, as shown by your first map there?

Ans. Well, in the survey from the original plat I made lot number 3, 80 acres; 2, 47 and $\frac{72}{100}$ acres, & lot number 4, 104 acres.

69 Q. Making a total of what acreage in the three lots?

Ans. 231 & $\frac{72}{100}$.

Q. In that survey, are the lots 5 & 6?

Ans. Number 1 is not included in that.

Q. This is just lots 2, 3, & 4?

Ans. Yes, sir.

Q. But lots 2, 3, and 4 contain only 231 & a fraction.

Ans. 231 & $\frac{72}{100}$.

Q. Are the two lots 5 & 6, as shown by the other map, which you have on the opposite page there, embraced in the lots 2, 3, & 4 as shown by map number 1?

Ans. 5 & 6 is made up of lots 3 & 4.

Q. Carved out of lots 3 & 4?

Ans. Yes, sir; in the new map 1 is a part of 3 & 4 in the old map.

Q. Well, now, is this acreage the same in lots 2, 3, 4, 5, 6 as in lots 2, 3, 4?

Ans. No, sir; lot 3 contains as much in the old map as lot 3 & 6 does in the new map.

Q. I ask the question, if lots 2, 3, 4, & 5 & 6 contain the same acreage that lots 2, 3, & 4 does of this map.

Ans. Yes, sir.

70 Q. It is identically the same land?

Ans. Yes, sir; it contains the same thing.

Q. Just 5 & 6 carved out of portions of lots 3 & 4?

Ans. Yes, sir.

Q. You make lots 2, 3, 4, 5, & 6 contain 231 & $\frac{72}{100}$ acres?

Ans. Yes, sir.

Q. Would you say that the acreage was the same in 1887 that it was in 1889, two years prior? Had it lost anything?

Ans. No, sir; I think not in that time.

Q. There was no caving bank in 1887?

Ans. No.

Q. You would say that the acreage was fully as much in 1889 as it was in 1887?

Ans. Yes, sir; if there was any change it would be a gain; what is called the narrows has been getting narrower.

Q. Has there been a gradual accretion?

Ans. There has been a gradual increase of acreage in that section.

Q. Has there been a gradual accretion to that batture formed there, from the evidences?

Ans. Yes, sir; have. Since the old original survey was made there has been a filling up & a narrowing of the narrows, as
71 it is called. That was once the old river & it has filled up. It gives way on that bank & increases the acreage in section

22, but it has been very little in the last few years—very little increase. It has not been—I don't know what amount, but it has been very little in the last few years.

Q. So that by actual measurement the acreage in original lots 2, 3, 4, & 2, 3, 4, 5, & 6, as now under the new survey, amounts to 231 & $\frac{72}{100}$ acres?

Ans. Yes, sir.

The map was here offered in evidence.

Cross-examination:

Q. Mr. Ford, who were your chain-carriers?

Ans. Mr. Withers & myself.

Q. Where are they?

Ans. I am here & he is down on the plantation.

Q. Who was Mr. Withers?

Ans. Mr. William Withers. I don't know what his other name is.

Q. He is kin to the defendant?

Ans. I think he is.

Q. He is their representative?

Ans. Yes, sir.

Q. You & Mr. Withers carried the chain?

72 Ans. Yes, sir; I think he is a nephew or some relation. I made the survey twice over, to see if it held out, by a couple of darkies, & then I verified it by taking a chain myself with Mr. Withers, which amounted to the same.

Q. What did you find at the southeast corner of section 22, T. 3, range 3 west, as indicating that section?

Ans. There was nothing there to indicate that corner.

Q. Nothing to indicate it?

Ans. No marks; it was in an open field. The timber had been cleared away.

Q. Who told you where that corner was?

Ans. Well, I had the field-notes; they run from the northeast corner & had the distance & bearing. I found them by a measurement from another established corner.

Q. Who carried the chain to make that measurement?

Ans. That was a couple of darkies.

—. So that at the southeast corner of section 2, T. 3,

73 range 5 west, you found nothing to indicate the corner?

Ans. No, sir; there is no timber there. I found the references in the northeast corner, & then I had the bearings & the distance.

Q. You say you then went there & you & Mr. Withers carried the chain & you made that survey at his request?

Ans. Yes, sir; on his place.

Redirect examination:

Q. You would say those two maps are correct?

Ans. Yes, sir.

Q. State whether or not that map is correct.

Ans. It is—I think it is. I have every evidence to believe that it is, if the bearings & distance are correctly laid down by the notes of J. C. Forshey. I found four trees that he calls for with the marks as he represents; that was the evidence.

Q. You made it by the original field-notes of the U. S. Government?

Ans. Yes, sir; I run from his northeast corner of section 22 & had to start off the line in order to get down to the point & run a half a mile to his other point.

74 Q. To his corner below?

Ans. I did not find it at the extreme southeastern corner, for there is no timber there, but from the northeast corner of section 22 to the southeast is about a mile. On the half mile there was a post put there that divided lot No. 1 & 2.

Q. Then you got the northeast corner of lot 2?

Ans. Of lot 1, & by that it gave me the northeast corner. The cypress that was there corresponded with the bearing and distance given to us; but it was cut down, but there was a cross on the stump of it, & then some other surveyor had been there & made another cross somewhere else, but I did not notice that. It was run by his notes & the balance of the survey was in the field, and there was no timber standing that identified the corner further than the bearing & distance, because it was bound on the east by lot- 2 & 4, & was bound on the east by the Homochitto river. I extended those lines from the eastern part of the section until I came near the waters of the river, and there is where the little

75 field is made in approaching the present level.

The map referred to by the witness was then read or offered in evidence & is as follows:

(Here follows map marked p. 75.)

76 THOS. J. CARSON, witness for defendant, was then sworn, & testified:

Q. Mr. Carson, will you please to state what is your profession?

Ans. Lawyer.

Q. Were you employed at any time during the year 1889—1888 or 1889—to look after the taxes on the lands of Mr. Withers down in Wilkinson county, &, if so, state what you did, and what you did in pursuance of your employment.

Ans. Yes, sir; I was employed by George W. Koontz, the agent of Mr. D. D. Withers, to go down & see in what way the discrepancy in the amount of taxes that he had paid for the year 1887 & previous years had arisen.

Q. Were they more or less for 1887?

Ans. They were very much less. He said there was so many & such a large body of land there & it was so hard to keep it straight that he could not tell what precise land the mistake was in, but that there was a great discrepancy in the amount that he had paid—

I think it was 1887, for the taxes of 1887 & in previous years—& that there must be something wrong there. I went down
77 there & opened an examination of Mr. Withers' deeds to various pieces.

Q. Who did you go to when you went there?

Ans. I first went to the sheriff.

Q. What is his name?

A. F. D. Lewis.

Q. What kin to plaintiff?

Ans. He is, I understand, a brother to Lewis, the plaintiff. I told Mr. Lewis, the sheriff, what I was there for. I told him that we thought we had not paid on all Mr. Withers' land, & I was there to see about it. He says, I do not think you have paid on all Mr. Withers' land, but he says, I am very much engaged at this time; the chancery court is in session & my services are needed there, but I will take you in & introduce you to my deputy, Mr. Miller, who is much more familiar with the lands in this county than I am, & to just make yourself at home in my office & use him until you get everything straight, and that was about all that took place between the sheriff & myself.

Q. When was that?

Ans. In January, 1888, prior to this sale. It was between
78 the tenth & twelfth of January, because I paid the taxes on all the lands. I discovered on January 12th, the date of the tax receipts which I have. On investigation, I found that the following pieces of land had been omitted from Mr. Withers' assessment.

Q. How assessed?

Ans. It was assessed as unknown. The previous year it had been assessed with the full valuation of the other lands, or about $9 an acre, & it had all been assessed, I think, at a valuation of about nine dollars an acre, & been paid on previous years, as will be shown by these tax receipts. These pieces of land were assessed as unknown at one dollar an acre.

Q. Give the description of those pieces.

Ans. 242 acres, southwest quarter & west half of the southeast quarter, valued at $242.00, in section 32, T. 3, range 4 west; 320 acres, west half of southwest quarter, northeast quarter, & east half northwest quarter of section 6, T. 2, range 5 west, assessed at one dollar an acre; 1–6, section 16, T. 3, range 5 west, containing 80 acres & valued at eighty dollars.

79 Q. Is that the land in controversy?

Ans. No, sir; this is the land I found had been omitted & assessed as unknown, which accounted for the discrepancy in the acreage. 200 acres comprised an accretion from Mississippi river, in sec. 3, 4, & 7, T. 2, range 5 west, & valued at $600.00. I paid the taxes on that also & on others: The south half of the southeast quarter of 21, T. 3, range 4 west, containing 88 acres & valued at $88.00, assessed as unknown. All this was assessed as unknown & omitted from Mr. Withers' list of lands.

Q. Reduced how much per acre?

Ans. Reduced about $7.00, I think. I paid the taxes on that "unknown," & in making the examination to see if I had finally gotten it all right I noticed the discrepancy in the acreage in lots 2, 3, 4. Lots 2, 3, 4 had been paid on in December; were still assessed to Mr. Withers & paid on in December, 182 acres. In comparing the tax receipt with previous tax receipts I noticed the discrepancy in the acreage of 2, 3, 4, & I called Mr. Miller the
80 deputy tax-collector's attention to the fact, & he then says, Well——

Statement of the deputy was objected to by complainant. The court overruled the objection, & complainant excepted.

Q. Tell what he did & what he said.

Ans. Mr. Miller said I will see about it & he stepped down to the corner of the room & he got out, he said, the township map. He said, Well, here is lots 2, 3, 4, & he footed it up, just making 182 acres. Well, I said, that is the right acreage, & I said, How do you account for the discrepancy? Well, he says, down on the river Mr. Withers has been paying for years on a great deal of land in the Mississippi river. He says, That is the latest survey & I suppose it is correct. Then it was I saw lots 5 & 6 on this map. I said, Well, who do lots 5 & 6 belong to? He said, Don't think they belong to Mr. Withers. He says, I don't know; I do not think they were ever assessed to Mr. Withers. I said, They were very close in to Mr. Withers' land, & he said, I do not think it was ever assessed to Mr. Withers. I was doubtful about it; I went
81 back. I had made a thorough examination of all Mr. Withers' muniments of title, & I went back & got the assistance of the circuit clerk—I believe it was—who was very familiar with records, to go with me, & we went back & checked over Mr. Withers' muniments of title—every piece that he had—from all these rolls and conveyances—every piece that he had—to see if lot-5 & 6 belonged to him. It was the first time that we had ever heard of lot-5 & 6, and nowhere did the deeds call for lots 5 & 6, &, of course, I had no knowledge of the discrepancy—that this was a discrepancy in the map or survey.

Q. Did you know anything of that new map?

Ans. Nothing, except what he told me: that this was the latest survey of this particular tract.

Q. You knew of no change in the maps?

Ans. No, sir; of no change in numbers at all; did not know but what that had been the map. I supposed, of course, that it was the original United States survey & never dreamed of a change in the United States survey, & our deeds had always called for
82 lots 2, 3, & 4, & when I saw a survey of lots 5 & 6, & could not find lots 5 & 6 on the deeds, of course I just presumed that the lands did not belong to Mr. Withers—in fact, supposed that it was some water lots there that belonged to no one, that are on the map, but there was really no land there.

Q. Do you recall anything else? You paid on all the land there that you found of Mr. Withers?

Ans. Yes, sir; the taxes on lots 5 & 6 were valued at 1 dollar an acre; the 80 acres amounted to only 2 or 3 dollars.

Q. You were there ready & willing to pay on them?

Ans. Yes, sir; ready to pay on all these lands.

Q. When did you first learn of lots 5 & 6 being the part of Mr. Withers' land?

Ans. Not until this suit was brought. I was only a little startled by the proximity on the map to lots 5 & 6, in examining the acreage of lots 3 & 4, to account for the discrepancy, but never thought of a variation in two United States surveys in the acreage. I never dreamed of it.

Cross-examination:

Q. Do you know that Mr. Miller was a deputy of the sheriff?

83 Ans. Well, I know this, that Capt. Lewis referred me to him as proxy, if not deputy.

Q. Did he tell you he was his deputy?

Ans. Well, I don't—my recollection of it was, I was speaking with him & I settled with Mr. Miller.

Q. Isn't it a fact that you went to see Mr. Miller to get information?

Ans. No, sir; I did not. Capt. Lewis was in the sheriff's office, in charge of the sheriff's office, & Mr. Lewis was upstairs in attendance on the chancery court. I went up.

Q. What did he say when he referred you to Mr. Miller?

Ans. He told me—he says I will introduce you to Mr. Miller, & my recollection is that he said he was his deputy, but he said Mr. Miller is more familiar with the lands than any one else here, & referred me to him as his deputy. He says, I will go to work and straighten it out; he says, I do not think Mr. Withers had paid on all these lands, but he says, Mr. Miller is now in the sheriff's office, & he went in there & introduced me, & him & I treated with him as the deputy sheriff in the transaction.

84 Q. Then you did not know that he was sheriff?

Ans. O, I did not know, except that he was introduced by the sheriff, as I understood, as his deputy.

Q. Will you refer to that statement of lands given in & see whether those lands are on the list & and what part of them?

(Handing Ex. A to Davis' deposition to witness.)

Ans. I will state this, that I have examined it & this is evidently the sheet containing this. B. P. Swan handed in Mr. Withers' lands, & this was part. All the lands are not in it, & I therefore do not think this is what Mr. Swan handed in, as he was perfectly familiar with the lands.

Q. But if this is the list which was handed in, the lands thereof assessed to unknown are not on it.

Ans. If this is all, none of those were put on, but lots 2, 3, & 4 were put on in the manner therein indicated.

Q. When you were there & your attention was called to lots 5 & 6

of these sections & the close proximity of those lands to Mr.
85 Withers' lands, did you demand to pay the taxes on those lands & tender the money for the taxes?

Ans. No, sir; I did not. I asked the question of Mr. Miller, if those lands were Mr. Withers.' He says—I remember perfectly the way in which he stated it—he says, Well, I do not think those lands were ever assessed to Mr. Withers. He says, I do not know, & he went back, & we went over the stubs of the preceeding year.

Q. He told you he did not think they had been assessed to Mr. Withers?

Ans. Yes, sir; there was nothing to intimate that the land had been assessed, because, as a matter of fact, I paid on one lot here that was extremely doubtful whether it was Mr. Withers' lot, but the taxes only amounted to a dollar or so, & I paid it rather than run the risk, & would have done so with this.

Sundry tax receipts were exhibited to the court, showing payment of taxes on lands in controversy up to the year in
86 which it was sold by the defendant Lewis.

Said tax receipts were read in evidence & are in the words & figures following:

No. 645.

Sheriff's office, Wilkinson county, Miss.

WOODVILLE, MISS., *Dec.* 1*st*, 1886.

Received of D. D. Withers $10.80, State, county, & teachers' fund taxes for the fiscal year 1886, as per following statements & descriptions of real & personal property, to wit:

Total personal assessment, $—; total real assessment, $600; rate per cent., —.

		Dolls.	Cts.	Acres.	Division of section.	S.	T.	R.
Statement of personal tax.	State tax			200	Composed of accretions from the Mississippi river to sections 3, 2, 5 W., & 4, 2, 5 W., & 7, 2, 5 W. $600.			
	County tax							
	Teachers' fund							
	Poll							
	Total							
Statement of real tax.	State tax							
	County tax							
	Teachers' f'd							
	Total	$10	80					
	Grand total							

F. D. LEWIS,
Sheriff & Tax-collector, Wilkinson County.

87 No. 604.

Sheriff's office, Wilkinson Co., Miss.

WOODVILLE, MISS., *Dec. 1st*, 1886.

Received of D. D. Withers $1,529.11, State, county, and teachers' fund taxes for the fiscal year 1886, as per following statements & descriptions of real & personal property, to wit:

Total personal assessment, $2,530; total real assessment, $82,419.94; rate per cent., —.

		Dolls.	Cts.	Acres.	Division of section.		S.	T.	R.
Statement of personal tax.	State tax			647	All	$6,146.50	8	2	4 W.
	County tax			650	N. ½ & lots 5, 10,				
	Teachers' f'd				9, 13, & 14	6,175	9	2	4 W.
	Poll			565	S. W. ¼ & W. ½ of N. W. ¼ & S. E. ¼ & S. ½ of N. E. ¼ & S. E. ¼ of N. W. ¼	5,367.50	21	3	4 W.
	Total								
Statement of real tax.	State tax								
	County tax			249	W. ½ of S. W. ¼ & lots 2, 3, & 4	2,365.50	22	3	4 W.
	Teachers' f'd								
	Total			90	N. p't lot 6 & E. p't lot 1	855	22	3	4 W.
	Grand total			242.52	S. W. ¼, W. ½ of S. E. ¼	2,303.94	32	3	4 W.

——— ———,

Sheriff & Tax-collector, Wilkinson County.

88 No. 605.

Sheriff's office, Wilkinson county, Miss.

WOODVILLE, MISS., —— —, 1886.

Received of D. D. Withers $\$-\frac{}{100}$, State, county, & teachers' fund taxes for the fiscal year 1886, as per following statements & descriptions of real & personal property, to wit:

Total personal assessment, $—; total real assessment, $—; rate per cent., —.

		Dolls.	Cts.	Acres.	Division of section.		S.	T.	R.
Statement of personal tax.	State tax			322	N. ½	3,059	32	3	4 W.
	County tax			637	All	6,051.50	1	2	5 W.
	Teachers' f'd			640	All	6,080	2	2	5 W.
	Poll			160	Lots 1 & 2	1,520	3	2	5 W.
	Total			541	Lots 1, 2, 3, 4, 5 fract'al	5,139.50	4	2	5 W.
				633	All	6,253.50	5	2	5 W.
				635	All	6,032.50	6	2	5 W.
Statement of real tax.	State tax			559	N. ½ & S. E. ¼ & W. ½ of S. W. ¼	5,310.50	7	2	5 W.
	County tax								
	Teachers' f'd								
	Total								
	Grand total								

——— ———,

Sheriff & Tax-collector, Wilkinson County.

89 No. 606.

Sheriff's office, Wilkinson county, Miss.

WOODVILLE, MISS., —— —, 1886.

Received of D. D. Withers $—$\frac{}{100}$, State, county, & teachers' fund taxes for the fiscal year 1886, as per following statements & descriptions of real & personal property, to wit:

Total personal assessment, $—; total real assessment, $—; rate per cent, —.

		Dolls.	Cts.	Acres.	Division of section.		S.	T.	R.
Statement of personal tax.	State tax			460	All	$4,370 ..	8	2	5 W.
	County tax			315	All	2,992.50 ..	15	3	5 W.
	Teachers' f'd			516	Lots 1, 2, 3, 4,				
	Poll				5, 6	4,902 ..	16	3	5 W.
				45	P't lot 5	427.50 ..	20	3	5 W.
	Total			262	Lots 2, 3, 4	2,489 ..	22	3	5 W.
				482	S. ½ & N. W. ¼	4,579 ..	23	3	5 W.
Statement of real tax.	State tax								
	County tax								
	Teachers' f'd								
	Total	$1,529	11						
	Grand total								

F. D. LEWIS,
Sheriff & Tax-collector, Wilkinson County.

90 No. 703.

Sheriff's office, Wilkinson county, Miss.

WOODVILLE, MISS., *Dec. 10th*, 1887.

Received of D. D. Withers $1,278.23, State, county, & teachers' fund taxes for the fiscal year 1887, as per following statements & descriptions of real and personal property, to wit:

Total personal assessment, $4,210; total real assessment, 10,979.96; rate per cent., .17.

		Dolls.	Cts.	Acres.	Division of section.		S.	T.	R.
Statement of personal tax.	State tax			647	All	6,146.50 ..	8	2	4 W.
	County tax			650	Lots 5, 9, 10, 13,				
	Teachers' f'd				& N. ½ 14 &	6,175.00 ..	9	2	4 W.
	Poll			483	W. ½ of N. W. ¼ & N. ½ of S. E. ¼ & S. W. ¼ & S. E. ¼ of N. W. ¼ & S. E. ¼ of N. E. ¼ & S. W. ¼ of N. E. ¼	4,588.50 ..	21	3	4 W.
	Total								
Statement of real tax.	State tax								
	County tax								
	Teachers' f'd			166	W. ½ of S. W. ¼ & S. ½, lots 2 & 3	1,577.00 ..	22	3	4 W.
	Total			161.69	N. W. ¼	1,536.05 ..	32	3	4 W.
				637	All	6,051.50 ..	1	2	5 W.
	Grand total			640	"	6,080.00 ..	2	2	5 W.
				230	"	2,185.00 ..	3	2	5 W.
						34,299.55			

Sheriff & Tax-collector, Wilkinson County.

91 No. 705.

Sheriff's office, Wilkinson county, Miss.

WOODVILLE, MISS., —— —, 1887.

Received of D. D. Withers $—$\frac{}{100}$, State, county, & teachers' fund taxes for the fiscal year 1887, as per following statements & descriptions of real & personal property, to wit:

Total personal assessment, $—; total real assessment, $—; rate per cent., —.

		Dolls.	Cts.	Acres.	Division of section.			
Statement of personal tax.	State tax			160.75	E. ½ of S. W. ¼ & W. ½ of S. E. ¼	1,527.12	23	3 5 W.
	County tax							
	Teachers' f'd							
	Poll							
	Total							
Statement of real tax.	State tax							
	County tax							
	Teachers' f'd							
		$278	23					

F. D. LEWIS,
Sheriff & Tax-collector, Wilkinson County.

92 No. 704.

Sheriff's office, Wilkinson county, Miss.

WOODVILLE, MISS., —— —, 1887.

Received of D. D. Withers $—$\frac{}{100}$, State, county, & teachers' fund taxes for the fiscal year 1887, as per following statements & descriptions of real & personal property, to wit:

Total personal assessment, $—; total real assessment, $—; rate per cent., —.

		Dolls.	Cts.	Acres.	Division of section.		S.	T.	R.
Statement of personal tax.	State tax			541	Lots 1, 2, 3, 4, & 5.	5,139.50	4	2	5 W.
	County tax								
	Teachers' f'd			633	All	6,713.50	5	2	5 W.
	Poll			318.49	W. ½ N. W. ¼ & S. E. ¼ & E. ½ of S. W. ¼	3,025.65	6	2	5 W.
	Total			599	All except E. ½ of S. W. ¼	5,310.50	7	2	5 W.
Statement of real tax.	State tax			460	All	4,370.00	8	2	5 W.
	County tax			315	All	2,992.50	15	3	5 W.
	Teachers' f'd			436	Lots 1, 2, 3, 4, & 5	4,142.00	16	3	5 W.
	Total			182	Lots 1, 2, 3, & 4	1,729.00	22	3	5 W.
	Grand total			241.12	N. W. ¼ & W. ½ of S. W. ¼	2,290.64	23	3	5 W.
						35,113.29			

——— ———,
Sheriff & Tax-collector, Wilkinson County.

93 No. 972.

Sheriff's office, Wilkinson county, Miss.

WOODVILLE, MISS., *Jan'y* 12, 1888.

Received of D. D. Withers 88.00, State, county, & teachers' fund taxes for the fiscal year 1887, as per following statements & descriptions of real & personal property, to wit:

Total personal assessment, —; total real assessment, 8471; rate per cent., $\frac{17}{100}$.

		Dolls.	Cts.	Acres.	Division of section.		S.	T.	R.
Statement of personal tax.	State tax			88	S. ½ of S. E. ¼	88.00	21	3	4 W.
	County tax			183	N. p't lot 6, E. p't lot 1	183.00	22	3	4 W.
	Teachers' f'd				N. E. ¼	165.00	32	3	4 W.
	Poll			165	P't of lot 5	45.00	20	3	5 W.
				45					
	Total								
Statement of real tax.	State tax								
	County tax								
	Teachers' f'd								
	Total	8	00						
	Grand total								

F. D. LEWIS,
Sheriff & Tax-collector, Wilkinson County.

94 Here defendant closed his case, & the plaintiff read on appeal, in evidence generally, the second subdivisional maps, proven by the testimony of Jno. M. Smylie, and read to the court in evidence an act of the legislature of Mississippi, approved Feb'y 16th, 1884, entitled An act to authorize the board of supervisors of Wilkinson county to procure a new & complete map of the several townships in said county, & which is in these words:

"SECTION ONE. Be it enacted by the legislature of the State of Mississippi, That the board of supervisors of the county of Wilkinson be authorized & empowered in their descression to procure a new & complete set of maps of the several townships of said county & may allow therefor a reasonable compensation to be paid by the county treasurer upon a warrant which may issue.

SEC. 2. Be it further enacted, That this act take effect & be in force from & after its passage."

The plaintiff here rested, and, the foregoing being all the evidence in the case, it was agreed by counsel & submitted to the court upon the written stipulation filed, & the court, having considered
95 the competent evidence in the cause, finds the following to be the facts necessary to a proper determination thereof—that is to say:

(See finding of facts, page 22 of this transcript.)

96 And be it further remembered that upon the return & filing of the said findings of fact the plaintiff excepted to the same because the court found that the defendant did not have actual notice or knowledge of the manner in which the assessment of his lands had been perfected, & did not have fair opportunity to pay his taxes, & that the assessment was invalid, & the said exception was allowed.

And be it *it* further remembered that upon the filing of the said finding of facts the plaintiff moved the court to find the issue joined — plaintiff & to render judgment in his favour.

But the court overruled the said motion & rendered verdict & judgment in favor of the defendant; to which action of the court the plaintiff then & there, in open court, excepted & his exception was allowed. And in order that the said rulings of the court may be reviewed by the Supreme Court of the United States, the plaintiff prays that this his bill of exceptions may be signed, sealed, enrolled, & made part of the record in the case; all of which is ac-
97 cordingly done.

This 27th day of November, A. D. 1890.

R. A. HILL, *Judge.*

Endorsed: Filed Nov. 27th, 1890. R. H. Winter, clerk.

98 *Petition for Writ of Error.*

THE UNITED STATES OF AMERICA, }
Southern District of Mississippi. }

To the honorable justices of the Supreme Court of the United States:

And now comes J. S. Lewis, by his attorney, and complains that in the record and proceedings and also in the rendition of judgment in a certain suit between him, the said J. S. Lewis, plaintiff, and David D. Withers, defendant, tried in the circuit court of the United States for the said southern district of Mississippi, at the November term thereof, A. D. eighteen hundred and ninety, and in which judgment was rendered against him on the 27th day of November, A. D. 1890, manifest error hath intervened, to the great damage of him, the said J. S. Lewis.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected.

D. C. BRAMLETT &
NUGENT & McWILLIE,
Att'ys for P'ff in Error.

The writ of error prayed by the foregoing petition is allowed, and the clerk of the circuit court of the United States for the southern district of Mississippi will, and he is hereby directed to, issue the same.

R. A. HILL, *Judge, &c.*

Filed Dec. 15th, 1890.

R. H. WINTER, *Clerk.*

99 *Writ of Error Bond.*

Circuit Court of the United States for the Southern District of Mississippi.

J. S. Lewis, P'ff in Error,
vs.
David D. Withers, Def't in Error.

Know all men by these presents that we, J. S. Lewis and Edw. Aaron and F. D. Sims, of the county of Wilkinson and State of Mississippi, are held and firmly bound unto David D. Withers in the sum of one thousand dollars, to be paid to the said David D. Withers; for the payment of which, well & truly to be made, we bind ourselves and each of us, jointly and severally, and our & each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 9th day of December, A. D. 1890.

Whereas the above-named J. S. Lewis hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States for the southern district of Mississippi in the above-entitled cause, wherein the said J. S. Lewis was plaintiff and the said David D. Withers was defendant, on the 27th day of November, A. D. 1890:

Now, therefore, the condition of this obligation is such that if the above-named J. S. Lewis shall prosecute his said writ of error
100 to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JOHN S. LEWIS. [SEAL.]
EDW. AARON. [SEAL.]
F. D. LEWIS. [SEAL.]

Signed & delivered in the presence of—
D. C. MILLER.
W. K. COOPER.

Approved:
R. A. HILL, *Judge*, &c.

Filed Dec. 15th, 1890.

R. H. WINTER, *Clerk*.

101 *Citation in Error.*

United States of America:

To David D. Withers, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed

in the clerk's office of the circuit court of the United States for the southern district of Mississippi, wherein J. S. Lewis is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment *of* the said writ of error mentioned should not be corrected and speedy justice should — be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court, this 13th day of December, in the year of our Lord one thousand eight hundred and ninety.

R. A. HILL, *Judge, &c.*

The undersigned, attorneys for David D. Withers, defendant in the cause above referred to, hereby acknowledge service of the above citation, and that a copy of the same has been duly delivered to them, together with a copy of the writ of error, this December 15th, 1890.

S. S. CALHOON,
MARCELLUS GREEN,
Att'ys for D. D. Withers, Def't.

Filed Dec. 15th, 1890.

R. H. WINTER, *Clerk.*

102 Original.

UNITED STATES OF AMERICA:

The President of the United States to the honorable the judge of the circuit court of the United States for the southern district of Mississippi, Greeting:

Because that in the records and process and also in the rendering of judgment in a suit before you, between J. S. Lewis, a citizen of the State of Mississippi, residing in the said southern district thereof, plaintiff in error, and David D. Withers, a citizen of the State of New York, defendant in error, a manifest error has intervened, to the great damage of the said plaintiff in error, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do openly and distinctly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States, on the second Monday in October next, at Washington, being the present seat of the National Government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, at Washington aforesaid, this 15th day of December, in the year of our Lord one thousand eight hundred and

ninety, and of the Independence of the United States the one hundred and fifteenth.

[Seal U. S. Circuit Court, District of Mississippi, Southern Circuit.]

R. H. WINTER, *Clerk.*

[Endorsed:] Writ of error.

103 I, R. H. Winter, clerk of the circuit court of the United States for the southern district of Mississippi, certify that the foregoing and hereto annexed 102 pages contain a true, full, and complete transcript of the record, pleas, process, & pleadings had and done in the cause lately pending in said court, wherein J. S. Lewis was plaintiff and David D. Withers was defendant, as fully and completely as same now remains on file & of record in my office.

Seal U. S. Circuit Court, District of Mississippi, Southern Circuit.

Given under my hand & seal of said court this 9th day of February, 1891.

——— ———.

D. C. Bramlett, Esqr., to R. H. Winter, clerk, Dr.

1891.

Feb'y 9th. For transcript of record in above cause..... $30 00

Paid.

R. H. WINTER, *Clk.*

Endorsed on cover: Case No. 14,483. S. Mississippi C. C. U. S. No. 385. J. S. Lewis, plaintiff in error, *vs.* A. C. Monson, executor of David D. Withers, deceased. Filed February 14, 1891.

In the Circuit Court of the United States for the Southern District of Mississippi.

JOHN S. LEWIS, Plaintiff,
vs.
DAVID D. WITHERS, Defendant. } 3505.

In this case the parties waive a jury and agree that the issues of law and fact arising therein shall be submitted to and decided by the court, either party, in case of dissatisfaction, to have the same right of appeal or writ of error as if the case had been tried by and before a jury.

D. C. BRAMLETT AND
NUGENT & McWILLIE,
For Plaintiff.
T. J. CARSON,
CALHOON & GREEN,
Att'ys for Def't.

To save costs and delay and the necessity for the issuance of a certiorari it is stipulated and agreed that the above agreement of counsel, filed in the cause November 14th, 1890, and before the trial, may be considered and treated by the court on the submission of the case as part and parcel of the record.

WILLIAM L. NUGENT,
For Pl'ff in Error.
MARCELLUS GREEN,
For Def't in Error.

[Endorsed:] Case No. 14,483. Supreme Court U. S. October term, 1893. Term No., 385. J. S. Lewis, P. E., *vs.* A. C. Monson, executor, &c. Stipulation and addition to record. Filed Jan. 12, 1894.

Office Supreme Court U. S.
FILED.
NOV 28 1893
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES,

No. 385.

J. S. LEWIS, PLAINTIFF IN ERROR,

VS.

A. C. MONSON, EXR., DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States, for the Southern District of Mississippi.

BRIEF OF W. L. NUGENT,

FOR PLAINTIFF IN ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM. 1893.

No. 385.

J. S. LEWIS, PLAINTIFF IN ERROR,

VS.

A. C. MONSON, EXR., DEFENDANT IN ERROR.

HISTORY OR THE LITIGATION.

This suit was originally brought in the circuit court of Wilkinson county, Mississippi, by the plaintiff in error against the tenants of David D. Withers, to recover the possession of lots 5 and 6 of Sec. 22, T. 3, R. 5 w., containing 80 acres. Withers was then, and continued up to his death to be, a citizen and resident of the State of New York. At the June term, 1889, of the said court, Withers, as landlord, was admitted to defend, under Section 2482 Code of Mississippi, 1880, and filed his petition and bond for the removal of the cause into the circuit court of the United States for the Southern District of Mississippi. When the record was brought up there was a substituted declaration

filed by leave of court and the case was tried upon it. R. 10. There was no motion to remand, and it is assumed that no question of jurisdiction can arise, as Withers was never found nor served with process in the district. By written stipulation a jury was waived and the case was tried by the court, and to an adverse judgment this writ of error is prosecuted. The following errors are assigned:

1. The court erred in admitting evidence of the statement by Miller, said to have been a deputy of the tax collector, to Carson, the defendant's agent and attorney, and in considering any such statements in reaching its conclusion of facts. P. R. 34.

2. The court erred in reaching the conclusion that the return of the assessment was made without the knowledge of defendant, or his agent, and that he had no notice of the subdivision of his land into six lots, nor of the procuring of the new maps by the county, and that defendant first ascertained the discrepancy in the acreage of his land when this suit was brought, and that the assessment was invalid, and on this account, in giving judgment for the defendant.

3. The court erred in not rendering judgment for the plaintiff in error on all the competent evidence in the case. There was nothing in it at all calculated to invalidate his title.

4. The court erred in overruling the motion of plaintiff in error for judgment in his favor on the stated findings of fact by the court. If true they did not warrant a judgment for the defendant.

Wherefore the plaintiff in error now prays a reversal of the judgment of the court below, and for judgment here in his favor for the land sued for, and the rents accrued thereon, as shown by the evidence and the findings by the court.

STATEMENT OF THE CASE.

On the 6th of March, 1888, lots 5 and 6, Sec. 22, T. 3, R. 5 w. 80 acres, in Wilkinson county, Mississippi, were sold for taxes by the tax collector of said county, and purchased by J. S. Lewis, plaintiff in error. A deed to him was executed by the tax collector and delivered to, and filed with, the chancery clerk of the county, as the law required, and it was recorded after the period of redemption expired. P. R. 15, 16. When the plaintiff below read this deed it was admitted that the property in controversy was worth $6000 and its annual rental $450. R. 16. This made out his case, according to the laws and adjudications in Mississippi, and he was entitled to verdict and judgment thereon. Code of Mississippi, 1880, Secs. 521, 523, 525, 526; Virden v. Bowers, 55 Miss., 24; Bell v. Gordin, 55 Miss., 49, 50; Clymore v. Cameron, 55 Miss., 586; Griffin v. Dogan, 48 Miss., 11; Green v. Williams, 58 Miss., 752; Hardie v. Chrisman, 60 Miss., 671; Wheeler & Wilson Mfg. Co. v. Lyon, 62 Miss., 564; Lewis v. Seibles, 65 Miss., 251: Lochte v. Austin, 69 Miss., 273.

The defendant then undertook to show that the assessment under which the lots were sold was *invalid*, and introduced a good deal of testimony, much of which was incompetent but was not specially objected to because the case was to be tried by the court, which, in the nature of things, should not be affected by, nor consider anything in the way of evidence that is neither revelant nor competent. It is, perhaps, proper to note this evidence, without special reference to the findings by the court, and we now state it substantially.

1. One Swan, agent for Withers, gave a pencil memorandum of his principal's lands to C. W. Davis, the assessor of Wilkinson county for the year 1887, in which are found lot 4, Sec. 22, T. 3, R. 5 W. (80 a) 120,

lot 2, Sec. 22, T. 3, R. 5. w, 62 acres, lot 3, Sec. 22, T. 3, R. 5 w, (40 a) 80. R. 17. This was not signed by any one, nor is it in the form required by law. Code of Mississippi, 1880, Sec. 489.

2. The tract book of original entries in the chancery clerk's office shows the following subdivisions of said Sec. 22: Lot 1, 88 acres; lot 2, 62 acres; lot 3, 80 acres; lot 4, 120 acres. The *old* township maps in the office of the chancery clerk of said county do not show a division of the section into lots. The new township map procured by the board of supervisors of said county under the special act of 1884 (R. 40) shows the following division of said section: Lot 1, 88 acres; lot 2, 62 acres; lot 3, 40 acres; lot 4, 80 acres; lot 5, 40 acres; lot 6, 40 acres; making an aggregate of 350 acres. These maps were procured by the supervisors under the special act referred to; were filed in the clerk's office soon after the passage of the act; from that date have been recognized as the official township maps of the county; and have been used by the assessor and said board in all matters relating to the assess ment of lands. This last subdivision of the section into lots corresponds with the plat in the office of the Register of the land office at Jackson, Mississippi. There was never any order of the supervisors adopting any map or maps of the county.

3. The section has been assessed at different times in several different ways. In 1875 it was assessed as a whole, 350 acres, to D. D. Withers. In 1879 lots 2, 3, 4 were assessed to him as containing 262 acres. In 1883 the same lots were assessed to him as containing 260 acres. In 1887 the section was thus assessed: Lot 1, 88 acres, to S. A. V. Felters, lots 2, 3, 4, 182 acres, to D. D. Withers; lots 5 and 6, 80 acres, to unknown. P. R. 18, 19 and 20.

4. The original survey subdivided the section into

these lots: Lot 1, 88 acres; lot 2, 62 acres; lot 3, 80 acres; lot 4, 120 acres, and by this survey the lots were entered and patented to the parties under whom Withers claims title. R. 22, 24. After the lands were entered the section was, by order of the department, subdivided into six lots instead of four, and the south half of lot 3 was constituted lot 6; and 40 acres off the east end of lot 4 was laid off as lot 5. This last subdivision was effected under the act of congress of May 5, 1832, the first subdivision being disapproved. R. 25, 23, 24. See map P. R. p. 32.

5. No notice was ever given to Withers or his agent that, in making up the assessment for 1887, the subdivision of the section as formally adopted by the department would be followed instead of the old and varying methods that had been used. We think the case is thus fairly stated, though it is proper to say that the defendant below relied upon the statement made by one Miller, said to be a deputy tax-collector, to Carson, his attorney, as being sufficient of itself to vacate or annul the sale.

I.

The first assignment of error is well taken. It is not pretended that any fraud was attempted by the tax-collector, or anything done to throw Withers' attorney off the track and induce him to forbear an accurate and painstaking investigation as to the real *status* of the property in controversy upon the assessment rolls. It is not shown that Miller was anything more than a clerk of the Collector, or a general land agent in Woodville, Mississippi. The question in the case was whether the assessment was valid or not, and the tax collector of the county had no connection with it. It was made up by the assessor, a different and independent officer of the county, and, when approved

by the supervisors, a copy was made by the chancery clerk, he being ex-officio clerk of the supervisors, and delivered to the taxcollector as his warrant for the collection of the taxes assessed. Code of Mississippi, 1880, secs. 499, 503, 504, 505. The trial court seems to have considered the statement made by Miller as quite material, and has embodied it in the findings of fact. P. R. 12, 13. We objected to its being given in evidence and excepted when our objection was overruled. P. R. 34. If the defendant had brought a bill to cancel the tax title of the plaintiff because of a fraudulent conspiracy to bring about the sale, the evidence itself was not competent or relevant. Miller was selected by the defendant's attorney for the purpose, and there is not the least suggestion that he intended to deceive Carson, who was charged with the special duty of finding out whether the taxes on all the lands of Withers had been paid. The vital question back of the inquiry was whether the assessment was valid or not, and with that Miller had nothing to do. The evidence was pure hearsay, and would not have been competent had Miller himself been put on the stand.

II.

The court erred in finding as a fact that the assessment was made without the knowledge of the defendant or his agent, and that he had no notice of the subdivision of his land into six lots, nor of the procuring of the new maps by the county, etc. It is true that Withers and Carson both so testified; but it is a conclusive presumption that every one knows the law, and particularly the revenue laws of the state. The statute of Mississippi on this subject is plain: "To facilitate the assessment and collection of taxes the board of supervisors of each county shall procure, if not already done, and keep a land book, or book of

maps of all the townships or fractional townships in the county, which book shall be well bound, and shall be deposited in the office of the clerk of the board of supervisors, * * * * and it shall be the duty of the board of supervisors to carefully compare the assessment roll with the said maps with a view to the enforcement of" the provision requiring the assessment of every acre of land in the several counties. Code of Mississippi, 1880, sec. 495. Add to this, the special act of February 16, 1884, authorized the supervisors of Wilkinson county to procure a new and complete set of maps of the several townships of the county. P. R. 40. This new map, in so far as said section 22 is concerned, showed the subdivision thereof into six lots and the court will find it on page 32 of the record, certified to by Ford as being the last subdivision made by the United States, the first being shown by the left hand map.

Now if these maps were required to be procured and to be followed by the assessor in making up his roll, with what reason can it be said that Withers did not know what the law prescribed? On the contrary he is held to a knowledge of the law and that the assessment of the land was made so as to conform to its requirements.

III.

All the evidence is in the record, as well what is competent as what is not, and on all the competent evidence in the case the court should have given judgment for the plaintiff in error. The case simply stated, is this: The manager of Withers, not specially charged with the duty, presented to the assessor a pencil memorandum of his principal's lands, which, it is clearly shown, was very incorrect, and omitted a large body of lands that should have been included in it. P. R.

23, 34. This memorandum was not the "list" required by law. Code of Mississippi, 1880, Sec. 489. In it lots 2, 3, 4, Sec. 12, were included as containing 262 acres, and the acreage was corrected by the assessor so as to put 80 acres in lot 4, and 40 acres in lot 3. Lot 2 was given in as containing 62 acres, and was so assessed, or the three lots at 182 acres, when, by the new maps, they contained 151.72 acres, though there may have been a few acres af accretions that were considered by the assessor. P. R. 30. Lots 5 and 6 of the section were separately assessed to "unknown" according to the new maps, and as containing 40 acres each. P. R. 19, 32.

It is admitted that the revenue law of Mississippi was followed, and that the assessment so made up by the assessor was properly returned, considered and approved by the board of supervisors. P. R. 20. Section 499 of the Code of Mississippi, 1880, authorizes any one dissatisfied with his assessment to file his objections thereto in writing, on or before the first Monday of August, to be filed and preserved with the assessment rolls, and then provides that "any person failing to file objections, as herein provided for, shall be concluded by said assessment, and precluded from questioning its validity, after the approval of such assessment by the board of supervisors." In Horne vs. Green, 52 Miss., 456, the Supreme Court of Mississippi construed this section, and said: "The action of the board of supervisors in matters of assessment is only conclusive as to mere irregularities and matters of fact resting wholly *in pais*; such, for instance, as excessive valuation, *misdescriptions, listing property to the wrong owner and the like.*" The defendant below complained that the assessor did not assess lots 5 and 6 of sec. 22 to him, or did not assess the entire body of the land as lots 2, 3, 4, but, at best, this could

only be an irregularity, and he was precluded because of his failure to appear and object. In the language of the statute, he was *concluded* by the action of the board of supervisors, and *precluded* from questioning the validity of the assessment. There can be no sound reason urged against the constitutionality of the law; indeed, it has, as we have seen, been upheld and construed by the court of last resort in the state.

The mere fact that no special notice was given to Withers or his agent of the plan pursued by the assessor can be of no force, Besides, while he was in New York, his manager gave in the memorandum to which we have referred, and his agent, Mr. Koontz, does not seem to have given the matter any particular thought. P. R. 27, 28.

IV.

This brings us to the last error assigned. We insist that the trial court should have sustained our motion for judgment on the findings of fact in the record, and that we should have its judgment here reversed and a final judgment in our favor. There is nothing in the said findings to militate against this contention. It is conceded that Withers did not pay the taxes on lots 5 and 6, nor on the land included in them. His attorney, Carson, went to the court house of the county in ample time to have paid the taxes and prevented a sale of the land.

He was doubtful about the matter after he spoke to Miller, deputy tax collector; he examined the latest survey of the particular tract of land; he saw the lots 5 and 6 of this section, all of which, except lot 1, belonged to Withers to his knowledge, and because he could not find lots 5 and 6 of this section in any of Withers' muniments of title he concluded the land did not belong to Withers, but that they were water lots

that belonged to no one and that there was no land there. He knew that the amount of his principal's taxes was much less than in former years and that the acreage of his land was largely reduced. He did go to work and find some of Withers' lands assessed "unknown" and paid the taxes due on them. The collector told him he did not think he paid the taxes on all of Withers' land. Now how he could have supposed, when he looked at the new maps on which the assessment was based, that lots 5 and 6 were "water lots" and contained no land, is hard to conceive. An inspection of the map made by him disclosed the fact that lot 6 was the south half of what had been originally lot 3, and that lot 5 was constituted of 40 acres off the east end of what had been lot 4. From the candid statement of the witness it is apparent that he concluded he could decline to pay the taxes, and that the sale of lots 5 and 6 would pass to the purchaser *water* and not *land*. He could have paid the few dollars required and saved all this controversy. So far, at least, there was nothing to justify the conclusion reached by the court, unless it be that the case was so *hard a one* as to justify a *bad precedent* against the adjudications of the Supreme Court of Mississippi.

This brings us to the turning point in the case, in the estimation of the court below, and we now consider it. Richter vs. Beaumont, 67 Miss., 286, is relied upon to sustain the judgment of the court, and indeed it is cited by the court itself as necessitating the conclusion reached. In that case, the evidence offered by the defendant in the court below to invalidate the sale of his lands was excluded on motion, and judgment was had by the plaintiff in ejectment. The owner had given in his property in Woodville as lot 6 and it was so assessed, "he intending and understanding that lot 6 extended eastward according to the *ancient order*, so

as to include what, by the new map, is part of lot 7. He paid the taxes on lot 6, and lot 7 not being paid on was sold for taxes. It did not appear that the owner had ever done anything in recognition of the new map, or that he knew the *new map was conformed to by the assessor in assessing lots in Woodville.*" "It may be inferred," says the court, "from the fact of his residence in the town, and the recognition by the citizens and officials of the new map, that he was aware of it, and that the assessor was governed by it in assessing. If so, he should not be allowed to defeat the assessment and sale by his secret purpose and understanding. A mental reservation of the owner cannot be permitted to defeat the assessment. On the other hand, if, until a recent date, lot 6 was understood to embrace what, by a new map, is part of lot 7, and the owner and occupant was governed by the former description in giving it in to the assessor, and *did not know and should not have known,* that the assessor would deal with it as designated by the new map, he should not lose his land." There was no evidence in that case that the owner knew of the practical adoption by the citizens and officials of the new map, nor indeed, that the new map had ever been adopted by the aldermen of the town. The revenue laws of the state of Mississippi did not provide for the assessment of town lots beyond the direction that "in assessing land in any city or town, the assessor shall proceed according to theplat or plan thereof commencing with the lowest number of square and lot, or other subdivision, and proceeding numerically with all the lots in a square and all the squares in a city or town, until completed," etc. Code of Mississippi, 1880., sec. 490. There had been an old map of Woodville, and there was a new map adopted by the town; the matter was not regulated by law at all.

The distinction between the case relied on by the

court below and the one at bar is manifest. In the first place the public lands of the United States are divided under the act of Congress and the regulations of the Department having the matter specially in charge. By this law and these regulations the subdivision of fractional sections into forty acre lots as near as may be was required. 1 Lester's Laws, Regulations and Decisions, pp. 722, 723. The surveyor did not conform to the regulations in making the first survey and report, and his survey was not approved; but, by his last subdivision, he did obey the law, and the court will find the two maps inserted between pages 32 and 33 of the printed record. It is true that the entries were originally made in reference to the first map, and that the patents issued followed the entries; but that cannot alter the case inasmuch as the last subdivision effected in or prior to 1848 was the only one ever *ever recognized and approved in fact.* It is today, the only legal subdivision of the section that has ever been made.

In the second place the owner's attorney charged with the duty of seeing that the taxes on all of Withers' land was paid, *did* know that the real map made up by the United States surveyor, under the law and regulations of the Interior Department, had been deposited in the office of the clerk of the board of supervisors, and that the assessor had been governed by it in making up his assessment roll. The court below so found. P. R., 12, 13. But because he could find no such lots in Withers' title deeds "he concluded they did not belong to Withers but that they were water lots that belonged to no one, and that there was no land there." This suit quickened his perception of a fact that should have been realized *when he saw the map and the lots 2, 3, and 4.*

But if he did not know he "*should have known*" the

real *status* of affairs. The least inquiry would have led him to a thorough knowledge of the facts connected with the assessment of the property. His own tax receipts show that lots 2, 3, 4 of the section are assessed as containing 182 acres, when by the preceding assessment they appeared to contain 262 acres. P. R., 13. Clearly, therefore, he knew, or ought to have known, that the taxes on 80 acres of his land in the section had not been paid, and were not, in fact, paid when Carson was looking into the subject. As lots 5 and 6 of of the section were assessed at 80 acres, and they were the only other lots in the section it did not require any effort to locate the "missing" 80 acres. If, therefore, he " should have known" what *his eyes saw* and his understanding could have grasped,—that the assessor had dealt with the section as designated by the new map,—he cannot complain that his land was sold. What the supreme court of Mississippi suspected in Richter vs. Beaumont, *supra*, is a demonstrated fact in this case, and the authority referred to by the court below is against the conclusion reached. There can be no doubt of the fact that when, *long before the tax sale*, Mr. Carson went to the court house and learned all the facts by an actual inspection of the assessment roll and the new map from which it was made up, he concluded he could take the chances, and so acted because he thought the lots "were water lots that belonged to no one, and that there was no land there." Indeed he so testified and it appears in the findings of fact. R. R., 13.

No reliance, therefore, can be placed by him upon the decision of the supreme court of Mississippi, in the case last cited ; and the whole controversy about the title must turn upon the question as to whether the bald mistake of the defendant's attorney, not warranted by one single fact, and his wild conjectures as to "water lots," with the present knowledge that his

client had not paid the taxes on the very land in controversy, can be the ground for avoiding the assessment and sale of the lots. His secret purpose or understanding was that his principal should escape taxation, and the purchaser at the approaching tax sale should get "water lots;" not land, and he was, doubtless, congratulating himself in advance. How he could have conjectured that lots 5 and 6 were "water lots" is the most marvelous thing that appears in the record anywhere. There was nothing to give rise to it. If a mental reservation of the owner could not defeat an assessment, a deliberate blunder or mistake should not be allowed to do so. The revenue laws of Mississippi wisely conclude the tax-payer, and preclude his assailing the assessment of his property if he fail to pursue the course prescribed. His rights are carefully guarded, and the opportunity is afforded him to see that his lands correctly appear on the assessment roll. His failure to object is an acquiescence beyond his power to recall. Other rights have intervened; the plaintiff in error has acquired title to the lots; he has paid for them and is entitled to the protection of the law. It may be a hard case for the defendant in error, but his testator could impose the burden and folly of his agent's mistake on no other person. The holder of a tax-title in Mississippi is regarded with equal favor by the courts as any other owner, and his rights as such are carefully guarded.

Paxton vs. Valley Land Co., 67 Miss., 104; 69 Miss., 744.

WILLIAM L. NUGENT,
For Plaintiff in Error.

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BRIEF FOR DEFENDENT IN ERROR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1893.

No. ~~305.~~ 350

J. S. LEWIS, PLAINTIFF IN ERROR.

vs.

A. C. MONSON, EXECUTOR OF DAVID D. WITHERS, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSI-SIPPI.

Brief of Thos. J. Carson, S. S. Calhoon and Marcellus Green, Attorneys for Defendent in Error

IN THE

SUPREME COURT OF THE UNITED STATES,

No. 385.

J. S. LEWIS, PLAINTIFF IN ERROR.

vs.

A. C. MONSON, EXECUTOR OF DAVID D. WITHERS, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPIPPI.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

J. S. Lewis brought ejectment against David D. Withers to recover eighty acres of land, valued at $6000, and constituting a part of two large plantations, upon a tax title for which he paid about $5.00. The case was tried by the court upon an agreement that competent evidence only was to be considered. There was a finding of facts by the court, as hereinafter set forth.

If the evidence can be considered it shows that it was admitted on the trial that the defendant was the

owner of the property, by mesne conveyances from Alfred Cochran, who patented it in 1833 and 1835 from the United States, unless the tax title propounded by plaintiff is valid. (R. 25.)

The evidence further shows that the land was originally subdivided into lots 2, 3 and 4, containing sixty-two acres, eighty acres and 120 acres, respectively, by the United States, and, as divided, it was patented in 1833 and 1835 by the United States to Alfred Cochran, and that defendent held by mesne conveyances from Cochran the land which was described in his muniments of title as lots 2, 3 and 4. That defendant, a citizen of New York, was assessed with taxes on the land, in 1879, on lots 2, 3 and 4, 262acres ; in 1883, on lots 2, 3 and 4, 260 acres. That in 1887 defendant returned the land to the assessor for taxation, as will appear by the agreement (printed with this brief as Appendix B, correcting the Exhibit A, Rec. p. 17), as follows :

Lot 4, Sec. 22, T. 3, R. 5 W.....120
Lot 2, Sec. 22, T. 3, R. 5 W..... 62
Lot 3, Sec. 22, T. 3, R. 5 W..... 80

And also as part of Lochdale and Artonish plantations, containing in the aggregate 2002.60 and 3957.24 acres respectively ; and the acreage of these lots *as containing 262 acres* was embraced in these totals. That after this list was returned to the assessor the list was changed by the insertion of forty acres and eighty acres, as follows :

Lot 4, Sec. 22, T. 3, R. 5 W. (80 a.).....120
Lot 3, Sec. 22, T. 3, R. 5 W. (40 a.)..... 80

That the insertions (80 a.) (40 a.) were not in the handwriting of defendant nor any of his agents. That this list of lands so made by defendant was rendered the assessor as defendant's lands for assessment for taxation in 1887, and was accepted by the assessor.

That without the knowledge of defendant, or any notice to him, the assessor, in making up his assessment roll, changed the return thus made by defendant, and assessed defendant's lands as lot 2, sixty-two acres; lot 3, forty acres; and lot 4, eighty acres; and out of the land embraced in lots 3 and 4 of the original survey of the United States under which defendant bought, the assessor assessed lots 5 and 6 to "unknown" owner. and as containing eighty acres, to make the assessment conform to a map that had been procured by the board of supervisors in 1884; and which was a copy of a map made under the directions of the Surveyor General about 1838 and *after the lands in controversy had been patented.* Defendant had no notice or knowledge of this new map, and knew nothing of its existence nor of its use in the county. This map was procured by the board, under the act of the Legislature of Mississippi recited, Record p. 40, giving the board power to procure "a new and complete set of maps of the several townships of said county." This map was paid for by the board of supervisors, and it was generally used in the matter of the assessment of taxes, but it was never adopted as an official map by any order of the board. That the taxes were not paid on lots 5 and 6, as thus assessed, and they were sold for taxes, at which sale plaintiff bought them for $5, and claims title therefrom. Lots 2, 3 and 4 were assessed at $9 per acre; lots 5 and 6 at $1 per acre.

After defendant's agent received his tax receipts in 1887, he perceived a great discrepancy between their amounts and those for previous years, and he sent Mr. Carson, his attorney, in January, 1888, to Wilkinson county to look into the matter, and to see how the discrepancy arose, and, if there was any land omitted, to pay the taxes on it. Mr. Carson called on the sheriff, plaintiff's brother, and told him what he was was there for. He said he did not think that Withers had paid

on all his lands, but that he was busy, and that he would introduce him to his deputy, Mr. Miller, who, he said, was more familiar with the land matters than he was, and to use him until he got everything straight. Mr. Carson found that large bodies of defendant's land had not been paid on, and he paid the taxes on them. In the examination, when he came to lots 2, 3 and 4, Mr. Carson noticed the discrepancy of acreage, and asked Miller about it. Mr. Miller said he would see about it, and stepped down to the corner of the room, and got out, he said, the township map. "He said, Well, here is lots 2, 3 and 4, and he footed it up, just making 182 acres. Well, I said, that is the right acreage, and, I said, how do you account for the discrepancy? Well, he says, down on the river Mr. Withers has been paying for years on a great deal of land in the Mississippi river. He says, that is the latest survey and I suppose it is correct. Then it was I saw lots 5 and 6 on this map. I said, well, who do lots 5 and six belong to? I said, don't you think they belong to Mr. Withers?' He says, 'I don't know. I don't think they were ever assessed to Mr. Withers. I said, they are very close to Mr. Withers' land, and he says, I don't think *it was ever assessed* to Mr. Withers."

That he, Carson, made a thorough examination of Mr. Withers' muniments of title, from the land rolls and conveyances, and checked over every piece of land he had, to see if lots 5 and 6 belonged to him, but none of them called for lots 5 and 6, and it was the first time he, Carson, had ever heard of lots 5 and 6, and he concluded they did not belong to Mr. Withers. That he never heard of the new map, and had no reason to believe there had been any change in the survey as called for by Mr. Withers' muniments of title; that he was ready and willing to pay the taxes, which were only two or three dollars, if he had be-

lieved the land was defendant's; that he never heard that lots 5 and 6 were a part of defendant's land until this suit was brought.

The court thereupon "having considered the competent evidence in the cause finds the following to be the facts necessary to a proper determination thereof," (R. 40) as follows:

"This case having been submitted to the court as court and jury upon the written stipulation of the parties, the court finds the following as the facts upon which the rights of the parties are to be determined, to-wit:

"At the time the lands in controversy were entered and patented, in 1833 and 1835, to Cochrane, they were included in lots three and four of section twenty-two, township three, range five west, as patented, and the whole section, as shown by the tract book of original entries, was subdivided into four lots, lot one, containing 88 acres, lot two, sixty-two acres, lot three, eighty acres, and lot four, one hundred and twenty acres, and are thus described in defendant's muniments of title. The old township map deposited in the office of the chancery clerk of Wilkinson county, the proper depository under the laws of Mississippi, does not show a division of the said section into lots. The new township map produced by the board of supervisors of said county under the special act of February 16, 1884, read in evidence, shows that the said section was subdivided into six lots as follows: Lot 1, 88 acres; lot 2, 62 acres; lot 3, 40 acres; lot 4, 80 acres; lot 5, 40 acres; lot 6, 40 acres; making in the aggregate 320 acres. The new township maps procured by said board of supervisors are without certificate, but were accepted by the board in 1884, deposited in chancery clerk's office soon after the passage of said act, and from the day of their receipt have been recognized as the official township maps of the county, and the

above division of said section into six lots and the acreage attached to each correspond with the plats and maps in the office of the register of the land office at Jackson in this State, under the new subdivisional maps. The new maps procured under the said act of 1884 have been since their receipts used by the assessors and boards of supervisors in all matters relating to the assessment and equalizationof land.

"The minutes of the board do not show any order changing the assessment of D. D. Withers, or that the acreage of lots 2, 3 and 4, were diminished, and shows no special order in regard to the said lands or lots 5 and 6 of said section, except that the assessment roll of 1887, showing that lots 2, 3 and 4 contained 182 acres, and lots 5 and 6 containing 80 acres, was received and approved at the time required by law.

"In 1875, under a special act of the legislature ordering a new assessment of said lands in said county, said section twenty-two was assessed as a whole to D. D. Withers, and as containing 350 acres; in 1879 it was assessed to him as lots 2, 3, 4, Sec. 22, T. 3, R. 5 W., 262 acres; in 1883 it was assessed to him as lots 2, 3, 4, 260 acres; and in 1887, for the first time, said section was assessed as follows: Lot 1, 88 acres, to S. A. Fetters, agent; lots 2, 3, 4, 182 acres, to D. D. Withers, and lots 5 and 6, 80 acres, to "Unknown."

"There is no order of the board of supervisors adopting the new maps of 1884 nor the old maps, nor were they or the old maps ever marked "filed" by the clerk of said board. There was no order of said board ordering either of the maps to be recorded, but the new maps were received and paid for by the Board in March or April, 1884, by an order on its minutes.

"Section 22, T. 3, R. 5 W., was subdivided into six lots under the order of the department in or prior to 1848, and subsequent to their sale to Cochrane, and a map was made out by the surveyor general and a copy

of that map, as to the lands in controversy, was deposited in the office of the chancery clerk of Wilkinson county. Of this new subdivision of his land into six lots the defendant had no notice, nor had he any notice of the procuring of the new maps of said county or of their having been received and paid for by the board of supervisors of said county. The assessor of the said county, in making up his assessment roll of 1887, changed the description of the lands of defendant included in section 22 from the return of assessment made by defendant's agent, without his knowledge or that of his agents, in accordance with the new maps procured under the act of 1884, and thus assessed the lands that had in former assessments been put as lots 2, 3 and 4, sec. 22, were assessed as lots 2, 3, 4, 5 and 6, and in the manner above indicated. The defendant's agent and attorney went to the county site of Wilkinson county to pay defendant's taxes because, upon a statement to defendant by the collector, the amount was much less than in former years and the acreage of his land largely reduced, and for the purpose of clearing up and adjusting the whole matter. He discovered lands of defendant not included in the list furnished to the assessor by Swan, the defendant's agent, and paid on them. He applied to the collector, then engaged in attendance on the chancery court, who informed him that he did not think he had paid on all defendant's lands, and introduced him to a Mr. Miller, his deputy, there in his office, as one more familiar with the lands in the county than any one else, and requested defendant's agent to make himself at home and to use Miller until he got everything straight. In comparing the tax receipts of previous years with the tax receipt then in his possession said agent noticed the discrepancy in the acreage of lots 2, 3 and 4, called Miller's attention to it; Miller said he would see about it,

stepped into the corner of the room, got the township map and footed up the acreage of lots 2, 3 and 4 and found it 182 acres. Defendant's agent asked him how he accounted for the acreage, and he replied Withers had been paying for years on land in the Mississippi river, but added, referring to the maps, "These are the latest surveys and are, I suppose, correct."

"Defendant's agent then looked at the map and saw lots 5 and 6 thereon, and asked, "Who do lots 5 and 6 belong to?" Miller replied, "I don't think they belong to Withers." Said agent replied, "They are very close to Withers' land," and Miller answered, he did not think they were ever assessed to Withers and did not know whether they belonged to him or not. Said agent was doubtful about it; went back; made a thorough examination of Withers' muniments of title to see if lots 5 and 6 belonged to him. It was the first time he had ever heard of lots 5 and 6, and he had no knowledge of the discrepany, nor of the map beyond the fact that said Miller told him it was the latest survey of the particular tract. When he saw a survey of lots 5 and 6 and could find no such lots in defendant's muniments of title, he concluded the land did not belong to Withers, but that they were water lots that belonged to no one and there was no land there. Said agent was then and there ready and willing to pay the taxes on lots 5 and 6, but he did not tender the money for the taxes and demand a tax receipt as prescribed by law because he did not think the land belonged to Withers. He first ascertained his mistake when this suit was brought.

"In the tax receipt given for the taxes of 1887, lots 2, 3 and 4, sec. 22, T. 3, R. 5, are stated to contain 182 acres and in that for 1886 as containing 262 acres. The lands in controversy are worth six thousand dollars and the annual rental value thereof four hundred and fifty dollars.

"The pencil memorandum of defendant's lands sent by Swan, his agent, to the assessor of said county as a return of assessment is not in the form required by the assessment laws of Mississippi, but it was accepted as sufficient by the assessor, and was never changed or altered by Davis in any way after its delivery to C. W. Davis, county assessor, but on its face shows the following: Lot 4, Sec. 22, T 3, R. 5 W., (80a.), 120, as part of Artornish plantation, and added in the total as 120 acres, and lot 3, Sec. 22, T. 3, R. 5 W., (40a.), 80, as part of Lochdale plantation, and added in the total as 80 acres. Opposite the pencil memorandum of lot three there is a pencil memorandum as follows, "See.," which was made by the assessor. In this said pencil memorandum of lands, lot 2 of section 22 is placed above lot 3 of same section, and in lieu of the ditto marks there was after written in ink the figures of the section numbered 22, and the figure 4 in the (40 a.) in brackets opposite lot 3 was traced in ink, but by whom and when these changes were made does not appear, nor is there any evidence on the point except that neither defendant nor his agent did it.

"Lots 2, 3 and 4, were valued at nine dollars per acre, and lots 5 and 6 at one dollar per acre. The taxes only amounted to between two and three dollars on the land in controversy, and the amount paid by plaintiff to between four and five dollars."

Upon the case presented, the court delivered an opinion (which is made appendix A. to this brief) to which the special attention of the court is requested, as it is clear and cogent in its statement of the facts and unanswerable in its conclusions. From the opinion it appears that the buestion which determined the controversy was one *of fact*, and this ruling was predicated upon the opinion of the Supreme Court of Mississippi in *Richter v. Beaumont, 67 Miss., 285.*

The opinion of Judge Hill is not printed in the record, and we have had a certified copy of it printed as appendix A. to this brief.

Upon the "findings of fact" being returned and filed "the plaintiff excepted to the same because the court found that the defendant did not have actual notice or knowledge of the manner in which the assessment of his lands had been perfected, and did not have a fair opportunity to pay his taxes, and that the assessment was invalid and the exception was allowed." (R. 41.) This constitutes the *first exception taken.*

Thereupon plaintiff moved the court for judgment for plaintiff upon the finding of facts, which was overruled and plantiff excepted. This constitutes *the second and only other exception.* (R. 41.)

Thereupon, the court found a *general verdict* for defendant; and judgment was entered thereon, from which plaintiff brings this writ of error.

The cause was revived here against A. C. Monson, executor of D. D. Withers, upon the suggestion of the death of Mr. Withers, pending this appeal.

BRIEF.

FIRST ASSIGNMENT OF ERROR.

This assignment cannot be considered.

1. Because the court was by agreement to try the cause *and consider the competent evidence,* (R. p. 15); and there was no objection made to this evidence when it was offered, though under the agreement it was considered as offered "subject to objections," and no exception was reserved to any ruling of the court on the evidence.

2. Because the court in its recital of what it has considered the facts states, that "the court having con-

sidered *the competent evidence* in the cause finds the following to be the facts necessary to a proper determination thereof."

3. Because there was no objection made to this evidence in the objections made to the findings of fact. (R. 1.) There are other objections which will be noted hereafter.

SECOND ASSIGNMENT.

The error assigned here grows out of the first exception taken (R. 41); the precise exception was this: The court, upon a consideration of all the competent evidence, "finds the following to be the facts necessary to a proper determination thereof." Then follows the finding of facts. Upon "the return and filing of said findings of fact plaintiff excepted to the same, because the court found the defendant did not have actual notice or knowledge of the manner in which the assignment of his lands had been perfected, and did not have fair opportunity to pay his taxes, and that the assessment was invalid, and the exception was allowed." (R. 41.)

It will be perceived that this entire exception is to the conclusion of facts reached, and does not embrace a single proposition of law.

There was no request by counsel for the court to find the special facts on each proposition, so that an exception might be reserved to the proposition of law, if any, ruled by the court; but a general exception to the sufficiency of the evidence to support the finding is the only objection raised.

It will be noted that it was an action of ejectment with a general verdict for defendant, and with what purports to be a finding of facts, but the finding says nothing of any title being in plaintiff, good or bad; and does not disclose any finding upon the title whatever. It finds facts which, if applied to the evidence

generally, would show the respective titles of the parties, but the finding does not embrace any finding of title.

These questions are presented:

1. The special findings of the court are conclusive, and this court will not examine the evidence to ascertain if the finding is supported by the evidence.

Davis v. Freidrichs, 104 U. S., 618.
Saulet v. Shepherd, 4 Wal., 502.
United States v. Dawson, 101 U. S., 569.
Copelin v. Ins Co., 9 Wal., 461.
Tyng v. Grinnell, 92 U. S., 467.

2. A general exception to the finding of facts cannot be considered. "If the exception amounts to anything it covers the whole record. Such a practice never has been and never ought to be sanctioned by this court. Exceptions to be of any avail must present distinctly and specifically the ruling objected to. A case ought not to be left in such a condition that after the trial the defeated party may hunt through the record, and if he finds an unsuspected error attach it to a general exception, and thus obtain a reversal of the judgment upon a ~~permit~~ point that may never have been brought to the attention of the court below."

Ins. Co. v. Lea, 21 Wal, 162.

Wherein consider the general exception to the finding of the court that "the assessment was invalid."

Invalid in law or in fact? Is such an exception to go hunting through the record with its insatiate appetite for errors to feed where it pleases?

3. This exception is a mere request to find the facts differently from the conclusions reached.

4. And for the reasons hereinafter stated.

THIRD AND FOURTH ASSIGNMENTS.

These alleged errors arise from the refusal to sustain

plaintiff's motion for judgment upon the finding of facts for plaintiff. (R. 14).

1. This action of the court was proper because upon the facts as found plaintiff could not recover. There was no finding of any title in plaintiff. The finding of fact was for defendant. There could be no other verdict upon the finding than for the defendant.

2. This exception to the refusal to sustain this motion to render judgment "on the finding of facts stated by the court" (R. 14) was merely a general exception to the finding.

3. Because the evidence cannot be examined to ascertain the correctness of the finding.

4. 1st. The judgment was right upon the evidence, even if it is admitted for the sake of argument, that plaintiff held a tax title which could only be defeated by showing either that the assessment for taxation was invalid; or that no fair opportunity was afforded to pay the taxes.

In this connection special attention is called to the opinion of Judge Hill in this cause, and to the special finding whereby it appears that D. D. Withers, testator of defendant in error, was the owner of Lochdale and Artornish plantations in Wilkinson county, Mississippi, containing 2002.60 and 3957.24 acres, respectively, and that he made return of this land to the assessor for taxation in 1887, and described it accordingly to the map and survey of the United States as it was patented to his remote vendor, and as it appeared in his muniments of title, both as to lots and acreage. The assessor changed this return to make the description given, viz., Lots 2, 3 and 4, containing 62, 80, and 120 acres, respectively, conform to Lots 2, 3 and 4, upon a map which had been made by the Surveyor General of the United States after these lands had been patented, and whereby the land embraced in Lots

2, 3, and 4, containing 262 acres according to the original map and survey, was divided into Lots 2, 3, 4, 5 and 6, and as containing 62, 41, 80, 40 and 40 acres, respectively. (R. 24–5). That these lands were thus assessed without any knowledge of, or notice to, Withers of the change in his return, and without any knowledge or notice to him of the existence of this new map, and that Withers' agent, who sought to pay all the taxes due, was misled by the change in the assessment, and was by the misleading acts of the assessor and the collector prevented from paying the taxes. The court finds these as the facts.

The law of the case is settled in *Richter v. Beaumont*, 67 Miss., 287, a case exactly like the case at bar, in which the Supreme Court of Mississippi held, that if the taxpayer had no notice of the new map, and no notice of the change of assessment, that the sale for taxes conferred no title.

In that case the court held this to be a *question of fact* to be determined by *notice*.

Such being the construction of the statute of Mississippi in regard to the title, and the court having found, *as a fact*, that Withers had neither notice of the change of his return, nor of the new map, and as this court will not examine into the sufficiency of the evidence to support the finding, it would seem that an affirmance would necessarily follow.

But if the evidence was examined the court would find that the learned judge has right upon the facts as well as the law.

2. A survey and map made, without consent, under the authority of the United States, *subsequently* to the survey and map under which the land was sold and patented by the United States are inadmissible to affect the rights of such vendee.

Doe v. King's Heirs. 4 *How*., (*Miss*.) 125.
May v. Baskin, 12 *S. & M*., 428.

Bonney v. McLeod, 38 Miss., 393.

The whole argument of counsel for plaintiff in error is devoted to trying to show that upon his interpretation of the evidence the learned judge below erred in weighing the evidence by not finding for plaintiff. The uniform rule of this court has been that it will not consider the evidence to ascertain if the findings of fact are supported by the preponderance of the testimony. Counsel argue that upon the evidence the defendant had notice, or, at least, that he had knowledge of sufficient facts and circumstances to put him on inquiry. The court below decided this proposition of fact against counsel's view, and it would be a divergence from the established practice for this court to grant a new trial upon the ground that the preponderance of the evidence was against the finding of the court.

In his argument counsel assumes the vital question to be, whether Mr. Carson could have ascertained by diligent inquiry that the assessment had been changed. But the real question is not whether Mr. Carson might have discovered that there had been a fraud practiced upon Withers by the change in his return of assessment, but whether the assessor in violation of the rights of Withers had made the change in his return; with this fact found for Withers, then, the sale would be invalid, unless the plaintiff showed that Withers had notice of the change. The burden of showing this notice was really upon plaintiff. He cannot meet this burden by showing that the tax collector's deputy, to whom Carson was referred as knowing all about the matters, further misled Carson by stating that Lots 5 and 6 had never been assessed to Withers, and that Mr. Withers had been paying taxes for years upon lots that had gone into the Mississippi river, when, in fact, Mr.

Withers had always paid the taxes on the land embraced in these lots 5 and 6, and had always assessed it to himself as lots 2, 3, and 4. If Miller knew all about the land, as the collector said he did, and he told Mr Carson, whom he knew wished to pay all Mr. Withers' taxes, that Withers had never been assessed with these lands, then, could Carson be blamed for being misled in relying upon the statements of an officer whose duty it was to collect all the taxes? Mr. Carson showed the greatest diligence, for he could have rested securely on this information of the collector, but he went further, and, with the circuit clerk who was familiar with all the lands in the county, he checked up Mr. Withers' muniments of title and the preceding assessments, and could find no evidence that Mr. Withers ever owned lots 5 and 6. The fault all lay with the assessor, supplemented by the conduct of the collector, whereby the return for assessment made according to the original surveys and muniments of title had been, without notice or authority of law, changed.

The criticism of *Richter v. Beaumont, 67 Miss., supra*, is without merit. It is not disputed that it holds that where a return for assessment of land according to an old map was made of lot 6, and the assessor assessed lot 6 to the party, and also made an assessment of lot 7, according to a new map, which was included within lot 6 on the old map, that a sale of lot 7 would confer no title, unless it was shown that the owner of lot 6 had notice of the change in his assessment. This being a question of fact the cause was remanded for that issue of notice *vel non* to be tried.

That issue is what has been tried here, and the court has held that Withers had no notice of the change of his return or of the map.

Richter v. Beaumont was not as strong as this case, for it did not involve the subsequent misleading con-

duct of the assessor. Here the original wrong is continued and intensified by the conduct of the collector, whereby Withers was prevented from finding out the wrong, and now the brother of the collector seeks to get title to $6000 worth of the land for about $5, through these wrong doings of the assessor and collector.

The verdict for the defendant was right and should be affirmed.

THOS. J. CARSON,
S. S. CALHOON,
MARCELLUS GREEN,
Attorneys for Defendant in Error.

APPENDIX A.

OPINION OF JUDGE R. A. HILL.

IN THE

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHREN DISTRICT OF MISSISSITPI.

NOVEMBER TERM, 1890.

JOHN S. LEWIS,

3505. v.

D. D. WITHERS.

This is an action of ejectment brought by the plaintiff against the defendant in the Circuit Court of Wilkinson county and removed to this court, to recover the land described in the declaration; to which the defendant interposed the general issue of not guilty. By written stipulation a jury trial is waived, and the questions of fact upon the proof, as well as the questions of law, are submitted to the court.

The eighty acres of land for which this action is brought, have been owned by the defendant for many years, and included in lots 3 and 4 of section 22, township 3, range 5 west, in Wilkinson county, as shown by the tract book of orignal entries. The whole section was subdivided into lots 1, 2, 3 and 4. Lot No. 1 never has belonged to defendant, but lot No. 2 is, and long has been owned by defendant. Lots 2, 3 and 4 were estimated to contain 262 acres, and were usually assessed by that description and as containing that number of acres, except in 1883 the number of acres was estimated at 260, and were given in by the agent of the defendant to the assessor for 1887, by the des-

cription of lot 2, 62 acres; lot 3 80 acres; lot 4 120 acres, making together 262 acres.

There is marked in brackets on the line of lot No. 3 the figures 40 and letter A, and on the line of lot No. 4 the figures 80 letter A, but by whom placed there or when, does not appear, the proof is that it is not in the handwriting of defendant or or his agent, and must have been by the assessor's deputy, or some one else. Some time in 1848 or 1849 the surveyor general was directed to re-section the lands of Wilkinson county, which was done, and a map thereof filed in the land office at Jackson. and by which lots 2, 3 and 4, above mentioned, were described as lots 2, 3, 4, 5 and 6, and by which the land in controversy was described as lots 5 and 6, each containing forty acres, and being contained in lots 3 and 4, as described in the entry tract book.

In 1884 a copy of this map was procured and placed in the office of the chancery clerk of said county, and as proof shows has since been regarded as the official map of the county, for the guidance of assessors and others, but no order of the board of supervisors has ever been made adopting it, or requiring assessments for taxes to be made of the lands in the county according to the designations and descriptions upon it. The first time any change was made in the description of the land in controversy, was by the assessor in 1887, when it was described as lots No. 5 and 6, each containing forty acres; of this change neither the defendant, or any agent of his, had notice.

Lots No. 2, 3 and 4 were assessed to defendant, and lots 5 and 6 to an "unknown" owner. Lots 2, 3 and 4 were valued at $9.00 per acre, and lots 5 and 6 at $1.00 per acre. The defendant paid his tax in due time by his agent on lots 2, 3 and 4. Other lands belonging to defendant were not put on the assessment roll or tax book but through the neglect or oversight of whom does not appear. The amount of the taxes for that year being so much less than usual, Mr. Koontz, the agent of defendant, supposed there must be some mistake about it, and requested Mr. Carson, the defendant's attorney, to go to Wilkinson county and look into the matter, and to ascertain the taxes due, if any, and pay the same, and for which he took the money with him, and ascertained

the taxes due on other lands of the defendant which had not been assessed to him, and paid the same. On the examination of the tax books by Mr. Miller, the sheriff and tax-collector's deputy, who was in charge of that business, and to whom Mr. Carson was referred by the sheriff as knowing more about it than himself, it was found that the taxes had been paid on lots 2, 3 and 4, the number of acres being described as 182, which Carson ascertained on the examination of the tax receipt, and called Miller's attention to it. Miller got the map in the office, from which the assessor had made his description in making out his assessment roll and found that lots 2, 3 and 4 contained 182 acres. Carson asked him how he accounted for the decrease in acreage, who replied that Withers had been paying for years on land in the Mississippi river, but added, referring to the map, that these are the latest surveys, and are, as he supposed, correct. Carson looked at the map and saw lots 5 and 6 thereon, and asked who they belonged to. Miller replied, "I do not think they belong to Withers. I do not know. I do not think they were ever assessed to Withers." Carson not being satisfied, and anxious to pay the taxes on all of Withers' land, examined his title-deeds with the assistance of the circuit clerk, who was familiar with the records, to see if lots 5 and 6 belonged to Withers, never having heard of lots 5 and 6, and could not find them, and had no knowledge of any change in the map, or description of the land, and all the deeds describing the land as lots numbers 2, 3 and 4, and by which they had before been assessed and known, he came to the conclusion that they did not belong to Withers, but was then prepared and anxious to pay the taxes on all defendant's lands, and for the reason stated he did not pay the taxes, and never learned that they were the lands of Withers until this suit was brought, nor did defendant nor any of his agents. The taxes not being paid, the land was sold and purchased by plaintiff for between four and five dollars, and not being redeemed within the time prescribed by law, the sheriff's deed to the land under the sale was delivered to the plaintiff, and is the only muniment of title.

These are substantially the facts as shown by the proof, so far as it is necessary to a determination of

the questions involved, and which are whether or not the plaintiff, under these facts, is entitled to recover this land, with its rental value, from the defendant, and which must be determined according to the statutes of the State, as construed by the Supreme Court of the State.

It is very clear to my mind that the non-payment of the taxes was alone caused by the change made in the description of the land by the assessor, and without the knowledge or consent of the defendant or any agent of his, and for which he is not in any way responsible; nor do I believe it makes any difference that the assessment roll with the change was reported to and confirmed by the board of supervisors. The defendant had a right to rely upon the description given by his agent, and that by which it had always before that time been known and assessed for taxes.

Plaintiff relies upon section 516, Code of 1880, which provides a form of receipt for taxes, and which shall be the only evidence of the payment of taxes due, and the decisions of the Supreme Court of the State holding this is the only evidence of such payment unless lost or destroyed.

But this is not a question of the payment of the taxes, but of the correctness of the assessment, the change in the description having been made, without notice to the defendant, or his agent, and as to whether or not this change without notice is an excuse for the non-payment of the tax by the defendant.

I am of the opinion that this question has been settled in favor of the defendant, by the Supreme Court of this State, in the case of *Richter v. Beaumont, Vol. 7, No. 9, Southern Reporter, page 357.* The facts in this case were that on the ancient division of the town of Ocean Springs, a lot of ground in the return for assessment was described as lot No. 6, and which was afterwards given a different description on a new map of the town, which was recognized by the citizens generally, and by the officials of the town, and which was assessed for taxes under and by the description on the new map, and the taxes not being paid, the same was sold for the non-payment of the taxes and conveyed by the tax collector. The court held that if the owner did not know of the new map and the change in the

description of the ground, but had given it in as lot or part of lot No. 6 to the assessor, that he would not be affected by the sale and conveyance.

This decision is so just that I presume no court will hold to the contrary under a similar state of facts and which, in my opinion, the facts in the present case are.

To deprive the defendant of the title to this valuable tract of land, under the facts stated, say nothing about the few dollars paid, would certainly be a hardship and wrong never contemplated by the Legislature.

Besides, the statute provides ample indemnity to the plaintiff by refunding to him all the money paid by him, with twenty-five per cent. damages and ten per cent. per annum interest thereon, until paid, with a lien on the land until payment is made. The result is that the finding of the facts must be in favor of the defendant, and judgment that when the amount paid with damages and interest are refunded he goes hence with his costs.

R. A. HILL, Judge.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF MISSISSIPPI.

I, L. B. Moseley, clerk of the Circuit Court of the United States for the Southern District of Mississippi, do hereby certify that the foregoing is a true copy of the opinion of Hon. R. A. Hill, Judge, in the case of J. S. Lewis vs. D. D. Withers, as the same appears on file in the records of said court.

Witness my hand and seal of office this 6th day of December, 1893.

L. B. MOSELEY, Clerk.

APPENDIX B.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN S. LEWIS, PLAINTIFF IN ERROR,
vs.
A. C. MONSON, EXECUTOR OF DAVID D. WITHERS, DECEASED.

Agreement of Counsel as to Record.

S. ½	Sect.	2x	T. 2	R. 5	West.		320	v
Lot 2	"	3x	"	"	"		115	v
Lots 1, 2, 3, 4, 5,	"	4x	"	"	"	Not laid off in lots	541	v
All of	"	5x	"	"	"		633	v
All of	"	8x	"	"	"		460	v
All except S. ½ of S. W. ¼	"	7x	"	"	"		559	v
Lots 5, 9, 10, 13 and 14	v	9 x	"	"	4		316	v
That portion south of narrows of Lot 1 & Lot 5		3 x	"	"	5	about	90	See
& of Lot 5		20 x	"	"	5			See
W ½ of N. W. ¼		6 x	"	"	5		79.62	
S. E. ¼ & E. ½ of S W ¼		6 x	"	"	5		238.87	v
Lot 4		22 x	"	3	5	(80 a)	120	v
S. W. ¼		1 x	"	2	5		159.25	v
N ½		2x	"	2	5		320	
(Artonish 39,57,24)								
Lot 2	See	22x	T	3	R	5	62	v
Lot 3		22x	"	"	"	(40 a)	80	v see
E ½		1x	"	2	"		318 91	v
N ½	v	9x		2	"	4	333	v
All of	v	8x		2	"	4	647	v
N. W. ¼		1x		2	"	5	159.25	v
N. W. ¼ & W ½ of S. W. ¼		23x		3	"	5	241.12	v
E ½ of S. W. ¼ & W. ½ of S. E. ¼		23		3	"	5	100.75	v
v (Lochdale 2002.60)								
All of Sec.		15x	T.	3	R.	5 west	315	v
Lots 2, 3, 4 & 5		16x	"	3	"	5 "	356	v
W. ½ of N. W. ¼ N. ½ of S. E. ¼ & S. W ¼		21x	"	3	"	4 "	348	v
W ½ of S. W. ¼ (Lot 4)		22	"	3	"	4 "	83	v
N W. ¼		32	"	3	4	"	161 59	v
Lot 1		16	"	3	5	"	80	v

S ½ of lots 2 & 3	22 " 3 4 "	83	v
S. W. ¼ of N. E. ¼ & S E ½ of N. W ¼	24x T 3 R 4	87	v
S. E. ¼ of N E ¼	21 x " 3 " 4	43	10 v
	Lockleven 1557	70	

In tax receipt bottom of page 39 printed record "lots 1, 2, 3, 4, Sec. 22, T. 3, R. 5.00," should appear thus, "lots 2, 3, 4, Sec. 22, T. 3, R. 5.00" the acreage remaining as stated, 182.

We, the undersigned attorneys for plaintiff and defendant in error in the case of John S. Lewis v. A. C. Monson, executor, v. in Supreme Court of the United States, to correct a clerical misprision in the transcript herein, as appears by the printed record, hereby agree that the foregoing is a correct copy of the original of "Exhibit A to statement of C. N. Davis," set forth on page 17 of the printed records, and that the tax receipt page 39 should read as stated, and that the foregoing may be considered as part of the record herein on appeal as the correct copy of said "Exhibit A." printed in the record.

WILLIAM L. NUGENT,
For Plaintiff in Error.
S. S. CALHOON,
MARCELLUS GREEN,
For Defendant in Error.

Office Supreme Court U. S.
FILED.
JAN 15 1894
JAMES H. McKENNEY,
CLERK.

—IN—

THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1893.

No. ~~365~~. 385

JOHN S. LEWIS, PLAINTIFF IN ERROR,

vs.

DAVID D. WITHERS, DEFENDANT IN ERROR.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

Copy of Stipulation Waiving Jury, and Brief of Plaintiff in Error in reply by

W. L. NUGENT, ATT'Y.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

JOHN S. LEWIS, PLAINTIFF,

3505, vs.

DAVID D. WITHERS, DEFENDANT.

In this case the parties waive a jury and agree that the issues of law and fact arising therein shall be submitted to and be decided by the court. Either party, in case of dissatisfaction, to have the same right of appeal or writ of error as if the case had been tried by and before a jury.

D. C. BRAMLETT and
NUGENT & MCWILLIE,
For Plaintiff.

T. J. CARSON and
CALHOON & GREEN,
Attorneys for Defendant.

To save costs and delay and the necessity for the issuance of a certiorari, it is stipulated and agreed that the above agreement of counsel filed in the cause November 14th, 1890, and before the trial, may be considered and treated by the Court on the submission of the case as part and parcel of the record.

WILLIAM L. NUGENT,
For Plaintiff in Error.

MARCELLUS GREEN,
For Defendant in Error.

BRIEF.

The argument of opposing counsel against our first assignment of error does not seem consistent. The court was, by special agreement, to try the case only on the competent evidence and, therefore, no objections *in limine* were interposed. It was assumed that, in the disposition of the controversy, incompetent evidence was no evidence; and as all the evidence, competent and incompetent, is in the record, this court can readily realize the importance of the error, if our view be correct, and dispose of it without difficulty. The court found as a fact that the defendant in error did not have *actual* notice of the manner in which the assessment of his lands had been perfected, and did not have a fair opportunity to pay his taxes, and that the assessment was invalid on that account. The agent of the defendant did testify that he had no notice, but, on the stand as a witness, he clearly stated that he saw the assessment, and the map according to which it had been made, and was cognizant of all the facts, long before the land in controversy was sold for taxes. It is respectfully submitted that, as to the question of no *actual* notice, there is no evidence at all. To put it tersely, the witness swore he did not have actual notice, and, on cross-examination, that he did. On this the court found that his direct statement was alone to be taken, and his other statements ignored.

The exception was reserved in the only possible way because of the arrangement and agreement between the counsel on both sides, and it would scarcely appear to be fair now to bring us up on a short turn by an appeal to technical rules. They may fit a hard case, but evidently would make a bad precedent. That the evidence showed notice cannot be contradicted. Indeed, the finding of facts by the court itself conclusively estab-

lished what the court said was not shown. Taking the facts found and certified by the court it was error to deduce from them anything but notice, and actual notice, too. The findings in this case were special; the wrong conclusion of fact was drawn by the court therefrom – the question of actual notice touching the matters above alluded to being an improper deduction. For, as the court itself states the facts, the agent of the defendant in error must necessarily have had notice.

Again, if, in the utter absence of testimony on a material point, the trial court were, of its own motion, to find its existence as part of the case, the strange spectacle would be presented of a wrong done without remedy, unless the rule we invoke can be applied here. The courts are always open and justice must be administered without sale, denial or delay. This presupposes evidence and not the absence of evidence; and the absence of evidence, it seems to us, could be shown as we have attempted to do in the case at bar. While it is expected that the trial court shall find conclusions of fact, or a statement of the ultimate facts or propositions which the evidence is intended to establish, it is nevertheless true that when the court states facts that utterly contravene its conclusions, there must arise the right to except just as it was exercised. But counsel are mistaken in their estimate of the court's findings. For while it is said in one place: "Of this new subdivision of his land into six lots the defendant had no notice, nor had he any notice of the procuring of the new maps of said county, or of their having been received and paid for by the board of supervisors of the county," (Record, page 12.) in another, it is recited that his agent had actual notice of all the facts and was informed that the survey on which the assessment was based was the latest survey of the particular

tract. P. R. 12, 13. This statement may be referred to the period of time when the assessment was being made, and the other afterwards; but it is beyond question that the agent and attorney did know, as far as any one not befogged could know, that his principal's lands were assessed according to the latest survey, and that he should have paid, though he did not pay, the taxes thereon. The exception, therefore, was not general but special and restricted to but one point of evidence; it was not addressed to the whole record, and is not open to the criticism of counsel. It is a mistake to suppose there was a mere general finding for the defendant in error; the findings were special and in detail, and on them the mind of the trial court acted when it was required to pass upon the motion for judgment made by the plaintiff in error.

An assessment cannot be invalid "in fact,"—it may be invalid "in law" because of a want of conformity to the statutes under which it is made. The learned judge who tried the case appreciated the issue differently, for he said: "But this is not a question of the payment of taxes, but of the correctness of the assessment, the change in the description having been made without notice to the defendant or his agent; and as to whether or not this change without notice is an excuse for the non-payment of the tax by the defendant." Brief defendant in error, p. 21. As we said in our original brief, no man can plead or prove ignorance or want of notice of a plain law. Withers, therefore, knew the law, and that the assessor was bound to follow and did follow it.

The authorities cited by counsel to show that the United States could not, subsequently to the issuance of a patent, alter in any way the subdivisions of a section into lots, under laws existing at the time the first subdivision was effected and which required such action, do not sustain the proposition. In Doe ex. dem.,

Martin vs. King's Heirs, 3 How. Miss., 125, it was simply held that a survey or map, made under the authority of the United States, is not admissable to change the survey of a Spanish grant, made prior to October, 1795. The court states the reason in these words: "It is a point too plain to admit of discussion, that the government had no power to change the *location* of King's land, if it ever had been located. He claimed by a complete title not derived from, nor in any way depending on the action of the government. The same act which passed the soil to the United States, confirmed him in his rights. How could the United States change a location fixed under a title vested long before they had a right to the soil, which was specially provided for in the treaty by which they acquired the right of soil?" In May vs. Baskin, 12, S. & M., 428, the controversy was between the government surveyor and the surveyor of Carroll county, Mississippi, and, in disposing of it, the court says, "The original survey fixed the rights of the parties. The government sold the land according to that survey, and conveyed it to the purchasers. No line could be afterwards run without the consent of all interested, which would vary the rights thus acquired." This utterance must, of course, be taken with reference to the facts, and, in the case at bar, no one's rights were at all affected by the new subdivision of the section into lots, the lines of which are nearly always projected and not run. The same land was included in the lots before as after the new arrangement; the number of lots only was increased as the law required, and had always required. In Browning v. McLeod, 38 Miss., 400, it was simply decided—and it has always been the law—that "marked and known lines designating the boundaries of land, indicating the original survey" cannot be disregarded. It is true the court says: "If the original survey was made upon a wrong or assumed valuation, or no valu-

ation at all, and its lines and boundaries are obvious, they are nevertheless the true boundaries of the patentee and those holding under him; and the law will not submit such boundaries to any other test, however scientific in the abstract." But here again the contest was between a government survey and one made by arbitrators upon an erroneous basis, and the case has no application.

Reduced to its last analysis the contention of counsel is, that the government itself could not change the subdivision of Sec. 22, T. 3, 5 W. so as to make it contain six instead of four lots, because, by the first survey, it was subdivided into four lots only, and the entries and patents conformed to that subdivision. To support this claim no authority whatever is referred to and none can be found, we assert. In the case of Spanish land grants a survey for identification disapproved by the Secretary of the Interior has no binding effect. Snyder v. Sickles, 8 Otto, 213–217. Surely there was no vested right in the particular subdivision of the section into four lots, and there could not be any claim of the kind asserted unless the original subdivision had been approved as the law required. But being, as it was, disapproved because it did not conform to law, and the surveyor general having altered the subdivision so as to make the section contain six lots, under the statute and directions of his superior, there is no just ground of complaint. The rights of the defendant in error were not affected a particle.

On the main question counsel are at fault. Our motion for judgment on the special findings should have been sustained. We think this has been fully demonstrated by us, but there may be some reason for further argument. The trial court in its opinion stated two propositions of law: Was the assessment, based on the authoritative survey and subdivision made by government agents, invalid because of the adoption by the as-

sessor of such subdivision; and if not invalid on that account, was the change without notice to defendant in error an excuse for the non-payment of the taxes due? If the assessment is invalid, and we think we have shown it was not, that necessarily ends the controversy, unless, as we contend, the tax-payer was concluded and precluded from questioning its validity, the roll having been approved by the board of supervisors. Code of Miss., 1880, Sec. 499. This section of the Code plainly declares that "any person failing to file objections * * * shall be concluded by said assessment, and precluded from questioning its validity after the approval of such assessment roll by the board of supervisors." And, by Sec. 503 of the same Code, ample provision is made to file any and all exceptions or objections. The decision in Richter v. Beaumont, 67 Miss., 286, we have no doubt, rested upon the broad equity that the appellant had, in fact, paid the taxes on the valuation of the *whole lot* under an assessment and description sufficient to prevent its forfeiture for that year. Dodds v. Maxey, 63 Miss., 443. In other words, he had given in his *whole* lot by the description contained in the ancient and approved map, and fixed *its entire value.* This valuation was retained, but a part of the lot was excluded by the assessor, who followed the new map of the town, and made no allowance whatever for the diminution in value thus occasioned. Practically the tax really due had been paid. There is no such contention here.

But the testator of the defendant never gave in any assessment at all. It is true that a mere memorandum was given in by an overseer not charged with the duty, and it did not contain all of Withers' lands. The taxes on a large body of lands omitted were paid by the agent at the very time he went to Woodville to look into the matter, and this fact appears in the findings of fact by the court. P. R. 12.

The revenue law of Mississippi is peculiar. Taxes assessed upon lands shall bind the same, and be entitled to preference over all judgments, executions, encumbrances or liens, whensoever created; and all taxes assessed shall be a lien upon and bind the property assessed, from the first day of February of the year in which the assessment shall be made; and it shall not be necessary to the validity of an assessment, or of a sale of land for taxes, that it shall be assessed to the true owner; but the taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold and shall vest title in the purchaser, without regard to who may own the land or other property when assessed or when sold." Revised Code of Miss., 1880, Sec. 470. The form for a conveyance upon any sale for taxes is given, "which conveyance shall vest in the purchaser a perfect title to the land sold for taxes, subject to the right of redemption; and no such sale shall be invalidated in any court of this state, except by proof that the land was not liable to sale for taxes, or that the taxes for which said land was sold had been paid before sale, etc." Code 1880, Sec. 525. In the case of Richter v. Beaumont, *supra*, the tax had really been paid, as the brief of appellant's counsel shows, and what the assessor unwittingly did was to reduce the size of the lot given in regularly and properly by the tax-payer, and allow the valuation to stand as fixed by the owner upon the whole lot, including that part excised. Practically, therefore, the case was one of a double assessment. Even, however, as thus considered the supreme court of Mississippi questioned the claim and remanded the case for a new trial, and further testimony or evidence on the subject. We do not think the authority in point, and endeavored so to demonstrate in our original brief.

It seems, therefore, clear to us that the trial court